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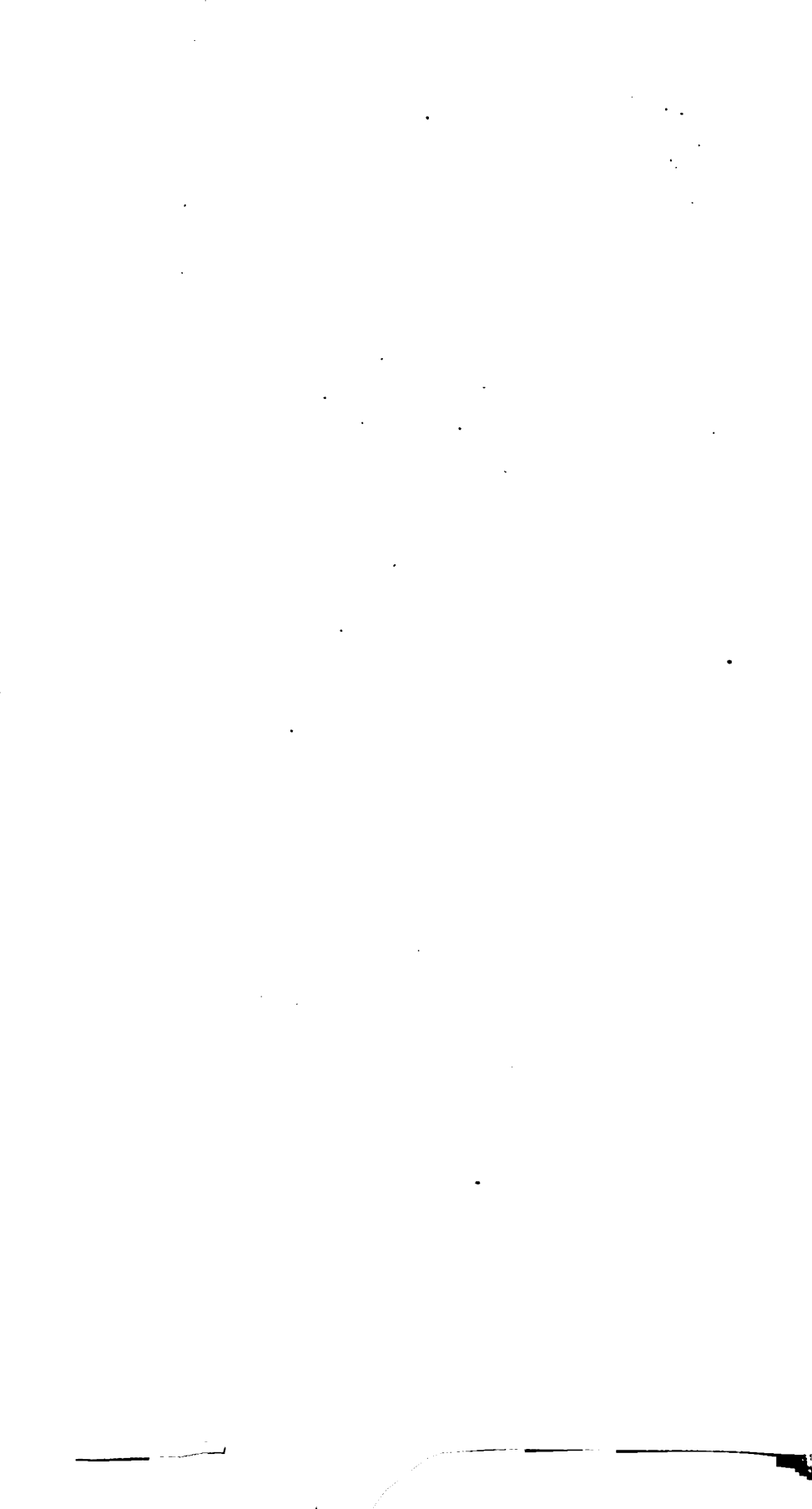
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
Courts of Exchequer
AND
Exchequer Chamber.

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

By ROBERT PHILIP TYRWHITT, Esq.
BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

“ *Ejus (Analogie) hæc vis est, ut id quod dubium est ad aliquid simile
de quo non quaeritur, referat; ut incerta certis probet.*”
Quinct. Inst. Orat. lib. i. c. 6.

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OF THE

COURT OF EXCHEQUER OF PLEAS,

*From Michaelmas Term 1833 to Trinity Term 1834,
both inclusive.*

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The Hon. Sir JOHN VAUGHAN, Knt.

The Hon. Sir JAMES PARKE, Knt.

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TO THE BINDER.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURTS OF EXCHEQUER OF PLEAS

AND

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

REGULA GENERALIS.

Michaelmas Term, 4 Will. 4.

1833.

IT IS ORDERED, That where a defendant is arrested upon an alias or pluries capias, issued into another county, pursuant to the rule *Michaelmas term, 3 Will. 4. s. 7.*, the defendant must put in bail in the county where he was arrested.

(Signed by all the Judges (a).)

(a) Read in Court, November 22, 1833.

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DARLING against GURNEY and Another.

In scire facias on a recognizance of bail, the plaintiff stated by way of memorandum, at the head of the matter intended to be a declaration, "that he brought in his bill in a plea of debt on a recognizance, the tenor of which bill follows in these words, to wit: "*Middlesex* to wit. Be it remembered &c." stating the two writs of sci. fa., the first of which recited the judgment against the party bailed. Plea, no ca. sa. against the principal. Replication set forth ca. sa.,

and stated it to be directed to and returned by the sheriffs of *London*. Rejoinder, that the original action was brought and the venue laid in *Middlesex*, and not in *London*. Surrejoinder raised an issue that the original action was brought and the venue therein laid in *London*, concluding with a verification. Special demurrer thereto, assigning for cause that it should have concluded to the country:—Held, that the surrejoinder was good, as it did not necessarily follow that the action must be said to be brought in the county where the venue was originally laid, for by change of venue the proceedings in the action may have been elsewhere; and 2dly, that the commencement of the declaration improperly stating that a bill was brought in &c. might be rejected as surplusage, after pleading over to it, as the objection had not been taken on special demurrer to the declaration.

A party who demurs specially to a subsequent pleading, *e. g.* a surrejoinder, may, on the general words of the demurrer, impugn a previous pleading, *e. g.* the declaration, though he has pleaded over to it, if the objection is duly stated on the margin of the demurrer book (a).

SCIRE facias on a recognizance of bail, against defendants as bail of *Tarleton*. The demurrer book set forth the roll entitled, Pleas before the Barons &c. in *Trinity* term 1833. Then as follows: *Middlesex* to wit. Be it remembered, that heretofore, that is to say, on 13 *April* 1833, *Darling*, a debtor &c. came before the barons &c. by *G. K.* his attorney, and brought then here into court his certain bill against *R. Gurney* and *S. H.* in a plea of debt upon a recognizance, the tenor of which said bill follows in these words, to wit: "*Middlesex* to wit. Be it remembered, that a writ of his present majesty under the seal of this Exchequer, by the consideration of the barons here, issued in these words, *William* the Fourth &c. (here followed the first writ of scire facias, tested *Michaelmas* term 1833, which recited the recovery by the plaintiff by judgment of the court in that *Michaelmas* term, against *J. C. Tarleton*, for 50*l.* 13*s.* 8*d.* damages in assumpsit, and the recognizance of bail of the defendant and *S. H.* of *Trinity* term 1833, and the return of nihil to the sci. fa.) The alias sci. fa. was then stated (as in *Tidd's Forms*, 5 ed. 507.) and

(a) As to this, see now Reg. Gen. *Ill.* 1834, No. 2. p. i.

the return of the sheriff that he had given notice to defendant and *S. H.* to appear before the barons at the time and place &c. The defendant's appearance was then stated. The prayer of execution for the damages—imparlance to the bill and prayer of plaintiff, that defendant and *S. H.* may answer him in the premises. Plea, no ca. sa. against the principal duly sued out and returned. Replication, setting forth the ca. sa. and that it was directed to and returned by the sheriffs of *London*; verification by the record. Rejoinder, that the action against the principal was brought and the venue therein was laid in the county of *Middlesex*, and not in the city of *London*, into which the ca. sa. had issued. Surrejoinder, that the original action was brought and the venue therein was laid in the city of *London*; concluding with a verification by the record. Demurrer, alleging the general causes as usual, and also for special cause thereof, that the matters alleged in the said surrejoinder, for the purpose of obtaining the judgment of the court herein, for the said plaintiff having execution adjudged to him as aforesaid, being partly matters of fact and partly matters of record, the plaintiff should have concluded the said surrejoinder by praying that those matters should be inquired of by the country, and not by a verification by the record. Joinder in demurrer.

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 v.
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Archbold for defendant was heard in *Trinity* term last in support of the special causes of demurrer. The action was brought in *Middlesex*, for the writ of summons, which since the act for uniformity of process in the commencement of the action (*a*), was issued into that county. That writ does not appear on the record at all. Then the question whether the action was brought

(a) *Alston v. Undershill*, ante, Vol. III. 427.

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in *London*, is matter of fact triable by the country, and not by inspection of the record. The replication admits the ca. sa. to be issued into *London*, but that is irregularity only. [Lord *Lyndhurst* C. B. Suppose the venue to have been changed from *Middlesex* to *London*, and the action to have proceeded in *London*, the county to which it was changed. I do not assent to the proposition that the action must necessarily be said to be brought where the venue was originally laid.]

Archbold then impugned the declaration, on the general words of the demurrer; but the court, after adverting to Serjt. *Williams's* note in *Duppa v. Mayo* (a), doubted whether the defendant having demurred specially to the plaintiff's surrejoinder, should afterwards be suffered to object to a previous pleading of the plaintiff for a defect in substance; but finally refused to hear the argument, on the ground that the objection intended to be argued had not been placed in the margin of the demurrer books. On another day in this term, at the pressing instance of counsel, that objection was permitted to be duly stated on the demurrer books, and was argued by

Archbold for the defendant. The court has no jurisdiction by bill in scire facias as here laid, and the declaration should have stated, that the plaintiff declared in scire facias. The only record in scire facias is the award of two writs of scire facias, which should be stated in the past tense throughout the record. Here, it is stated in the present tense. This is neither roll, record, nor entry in scire facias. A bill cannot be that record, and though such an instrument is here pleaded to have been brought in, that is not the act of the court, for before 2 *Will.* 4. c. 39., a bill was a complaint in writing of a cause of action against a defend-

(a) 1 *Saund.* 285, n. (5).

ant being before the court on its process. Nor, since it is so entered on the roll, can it be rejected as surplusage or denied to have issued.

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v.

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and Another.

Lord LYNDHURST C.B.—The averment of bringing in the bill is impertinent and inconsistent with the matter afterwards set out. That matter is, however, in the absence of a special demurrer, equivalent to the usual statement, that the king sent to the sheriff his writ close in these words &c. (a).

BAYLEY B.—Had this record begun by stating, Be it remembered that the scire facias issued, as is here done, without the incumbrance of the slovenly and inconsistent matter prefixed to it, it would have alleged all that was necessary, and would without doubt have been good. Now that preliminary matter may be treated as surplusage, as there is no special demurrer to the declaration on that account, and the defendant has pleaded over. It is clear that the plaintiff brings in a document which is in reality a transcript from the roll of scire facias, and no bill, though erroneously called such. The first writ of sci. fa. reciting the judgment against the principal, and the alias sci. fa. are duly stated, though prefaced by an informal and impertinent averment. Instead, however, of objecting to that on special demurrer, the defendant pleaded over, treating it as a declaration in scire facias. The demurrer to the surrejoinder cannot be sustained, and the time for impeaching the declaration by special demurrer, for the ground to which we have adverted, is passed; so that our judgment must be for the plaintiff. The other barons concurring,

Judgment for the plaintiff.

Busby was to have argued for the defendant.

(a) See declaration in sci. fa. Tidd's Forms, 5 ed. 512.

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STEPHENS, Clerk, *against* PELL.

Assumpsit.
The first count stated that plaintiff had lawfully distrained for 350*l.* due for rent, on the effects of one *L.*, against whom a fiat had issued, and of whose estate defendant claimed to be assignee, and had put a person in possession thereof; and that in consideration that plaintiff, at request of defendant, would withdraw the said person so put into possession, defendant, claiming to be assignee as aforesaid, undertook that the said sum should be paid to the plaintiff out of the produce of the sale of the same effects.

ASSUMPSIT. The first count stated, that before the making of the promise and undertaking of the defendant hereinafter next mentioned, the plaintiff had lawfully distrained upon certain effects theretofore of one *R. Lord*, against whom a fiat in bankruptcy had issued, and of whose estate and effects the defendant then claimed to be assignee for a certain sum of money, to wit, the sum of 350*l.* then due to the said plaintiff, for rent of certain premises, whereon the said effects had been so distrained by the said plaintiff as aforesaid, to wit, in the county aforesaid, and the said plaintiff had before that time there put a person into possession of the said effects, who at the time of the making of the said promise remained in possession thereof, to wit, in the county aforesaid, whereof the said defendant then and there had notice: and thereupon heretofore, to wit, on 4 *September* 1832, in consideration that the said plaintiff, at the special &c. of the defendant, would withdraw the said person so put into the possession of the said effects under the said distress, he the said defendant, claiming to be assignee as aforesaid, undertook &c. that the said sum of money should be paid to the said plaintiff out of the produce of the sale of the same effects: And the said plaintiff avers, that he, con-

same effects. Avertments, that plaintiff did withdraw the person from possession, and that defendant took possession; but though a reasonable time for sale of the effects and for such payments had elapsed, did not pay the said sum to the plaintiff.


Plea, that before defendant's promise was made, a fiat in bankruptcy was issued against *L.*, under which *L.* was found a bankrupt, and defendant was appointed his assignee. That defendant was only interested as such assignee in procuring the distress to be withdrawn, and that after making the promises declared on, and before a reasonable time had elapsed for the sale of the effects in the declaration mentioned, the fiat was duly superseded, and the defendant was afterwards unable to sell the said effects and pay the plaintiff out of the produce, and gave notice to the plaintiff of such inability, whereby the defendant was discharged from performing the promises in the declaration. Held, on demurrer, that the defendant's promise was unqualified, and that the plaintiff had relinquished his rights in consequence of it, and was entitled to recover.

Seemle, the plea was bad, for not disclosing that the defendant had not sold before the fiat was superseded.

fidng in the said promise and undertaking of the said defendant, did then and there withdraw the said person, so put into the possession of the said effects under the said distress, from the possession thereof, and that the said defendant then and there took and had possession thereof: Yet the said plaintiff in fact saith, that although a reasonable time for the sale of the said effects and the payment of the said sum of money out of the produce thereof hath long since elapsed, yet the said defendant hath disregarded his said promise in this, to wit, that the said sum of money hath not, nor hath any part thereof, been yet paid to the said plaintiff out of the produce of the sale of the same effects or otherwise, and the same sum of money still remains wholly due and unpaid to the said plaintiff.

Second count. That in consideration that the said plaintiff, at the request of the defendant, would withdraw a person before that time put into and then in possession of certain effects of great value, to wit, of the value of 500*l.*, and then being upon certain premises in the occupation of one *R. Lord*, under a distress for a certain sum, to wit, the sum of 350*l.* then due to the plaintiff for interest reserved as rent, he the said defendant undertook &c. that the said sum of 350*l.* should be paid to the said plaintiff out of the produce of the sale of the same effects: And the said plaintiff avers that he, confiding &c., did then and there withdraw the said person so put into the possession of the said effects under the said distress from the possession thereof, and that the said defendant then and there took and had possession thereof: Yet the said plaintiff in fact saith, that although a reasonable time for the sale of the said effects and the payment of the said last-mentioned sum of money hath not, nor hath any part thereof, been yet paid to the said plaintiff out of the produce of the sale of the same effects

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or otherwise, and the same sum of 350*l.* still remains wholly unpaid to the said plaintiff.

Third count. That in consideration that the said plaintiff, at the request of the said defendant, would withdraw a person before that time put into and then in possession of certain effects of great value, to wit, of the value of 500*l.*, wherein the said defendant claimed to be interested as assignee of the estate and effects of the said *R. Lord*, under a distress for a certain sum, to wit, the sum of 350*l.*, then due to the plaintiff for interest reserved as rent for and in respect of the premises whereon the said distress was so taken, and which then and at the time of the said distress were occupied by the said *R. Lord*, by the sufferance and permission of the said plaintiff, he the said defendant undertook and then and there promised the said plaintiff that the said last-mentioned sum of 350*l.* should be paid to the said plaintiff out of the produce of the sale of the said last-mentioned effects: And the said plaintiff avers, that he, confiding &c., did then and there withdraw the said person so put into the possession of the said effects under the said distress from the possession thereof, and that the said defendant took and then and there had possession thereof. Breach as in first count.

Fourth count. That in consideration that the said plaintiff, at the request of the said defendant, would withdraw a person before that time put into and then in possession of certain effects of great value, to wit, of the value of 1000*l.*, under a distress for a certain sum of money, to wit, the sum of 350*l.* then due to the plaintiff, and upon which said last-mentioned effects the said plaintiff had before that time lawfully distrained, he the said defendant undertook and then and there promised the said plaintiff that the sum of money for which the said plaintiff had lawfully distrained upon

the said last-mentioned effects should be paid to the said plaintiff out of the produce of the sale of the said effects. And the said plaintiff avers, that he, confiding &c., did then and there withdraw the said person so put into the possession of the said last-mentioned effects, under the said distress, from the possession thereof, and that the said defendant then and there took and had possession thereof, and that the said plaintiff had lawfully distrained upon the said last-mentioned effects for a large sum; to wit, the sum of 350*l*. Breach as in first count.

Fifth count. That in consideration that the said plaintiff, at the request of the said defendant, would withdraw a person before that time put into and then in possession of certain effects of great value, to wit, of the value of 500*l*., under a distress before then lawfully made by the said plaintiff for a certain sum, to wit, the sum of 350*l*., he the said defendant undertook and then and there promised the said plaintiff that the said sum of money should be paid to the said plaintiff out of the produce of the sale of the said effects. And the said plaintiff avers, that he, confiding &c., did then and there withdraw the said person so put into the possession of the said last-mentioned effects, under the said distress, from the possession thereof, and that the said defendant took and then and there had possession thereof. Breach as in first count.

Plea, that after the 11 *January* 1832, and before the making of the said several promises in the said declaration mentioned, to wit, on 8 *August* 1832, in &c., a certain fiat in bankruptcy was issued, according to the provisions of an act of parliament passed in the reign of our lord the now king, intituled, "An Act to establish a Court in Bankruptcy," by and under the hand of *Henry Lord Brougham* and *Vaux*, then being lord high chancellor of *England*, not directed to the

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court of bankruptcy, but directed to certain persons duly returned to and approved by the said lord high chancellor in that behalf, according to the provisions of the said act, purporting to authorize a certain person who had theretofore, to wit, on the day and year last aforesaid, in the county aforesaid, petitioned the said lord high chancellor for such fiat against the said *R. Lord*, and had then and there stated in the said petition that the said *R. Lord* was a trader subject to the bankrupt laws, and was indebted to such person in a sum exceeding 100*l.*, and being so indebted, and such trader as aforesaid, had committed an act of bankruptcy to prosecute his, the said petitioning creditor's complaint contained in his said petition, against the said *R. Lord*, before the said persons to whom the said fiat was so directed as aforesaid: And the defendant further saith, that after the issuing of the said fiat and before the making of the promises in the declaration mentioned, to wit, on the day and year aforesaid, in the county aforesaid, the said persons to whom the said fiat was so directed as aforesaid, having severally and respectively duly taken the oath prescribed and appointed to be taken by commissioners of bankrupts acting as such commissioners elsewhere than in the court of bankruptcy, did find that the said *R. Lord*, since 14 *July* 1832, had become a bankrupt within the true intent and meaning of the statutes in force concerning bankrupts, and before the date and issuing forth of the said fiat, and did then and there adjudge the said *R. Lord* to be a bankrupt accordingly: And the defendant further saith, that after the said adjudication and before the making of the promises in the declaration mentioned, to wit, on 3d *September* 1832, at a certain meeting duly held according to the provisions of the statutes in force relating to bankrupts, the defendant was chosen and

nominated by the major part of the creditors of the said *R. Lord* present at the said meeting, who had proved their debts against the estate of the said *R. Lord*, to be the assignee of the estate and effects of the said *R. Lord*, and that the defendant then and there accepted the trust of the said office of assignee: And the defendant further saith, that before and at the time of the making the promises in the said declaration mentioned, the defendant was no otherwise interested in procuring the said several distresses of the plaintiff in the said declaration mentioned to be withdrawn from the said several effects in the said declaration mentioned, than as such assignee as aforesaid, and for the benefit of the said estate; of all which several premises the plaintiff at the time of the making of the said promises in the said declaration mentioned had notice: And the defendant further saith, that the said several effects in the said declaration mentioned, at the time of the making of the said promises, to wit, in the county aforesaid, were the goods of the said *R. Lord*, but were then and there supposed by the plaintiff and the defendant to be the goods of the defendant as such assignee as aforesaid, and that at the time of the making of the said promises it was then the intention of the defendant (which intention the plaintiff then and there well knew) to sell the said several effects as such assignee as aforesaid: And the defendant further saith, that after making the said promises, and before a reasonable time had elapsed for the sale of the said several effects in the said declaration mentioned, to wit, on 1 October 1862, the said fiat against the said *R. Lord* was duly superseded by the court of bankruptcy: And the defendant further saith, that the said fiat was not obtained by the said petitioning creditor at the instigation or with the consent of the defendant,

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and that he the defendant was not in any manner privy to the petitioning for the said fiat, or to the procuring of the same to be issued, and that at the time of making the said promises in the said declaration mentioned, the defendant was wholly ignorant of any cause or reason, matter or thing, why the said fiat should be superseded, and that the defendant's said ignorance did not arise from any negligence or other default in him, the defendant: And the defendant further saith, that he did not procure, or in any manner attempt to procure the said fiat to be superseded as aforesaid, and that he, the defendant, always used due care and diligence to prevent the said fiat from being superseded improperly: And the defendant further saith, that by virtue of such supersedeas as aforesaid, he, the defendant, was after the said supersedeas unable to sell the said several effects and to pay the plaintiff out of the produce of such sale, and that after the said fiat was so superseded as aforesaid, he the defendant was by virtue of such supersedeas deprived of all power and control over the said several effects: And the defendant further saith, that before the commencement of this suit, to wit, on 4 *October* 1832, and within a reasonable time after the said fiat was so superseded as aforesaid, he, the defendant, gave notice to the plaintiff of such supersedeas, and that the defendant was so unable to sell the said several effects as aforesaid, to wit, in the county aforesaid, whereby the defendant then and there became and was legally discharged from performing the said several promises in the declaration mentioned. Verification.

General demurrer and joinder.

Talfourd Serjt. for the plaintiff, in support of the demurrer. The promise is not made by the defend-

ant in his character of assignee, and the plaintiff is entitled to recover, having withdrawn the distress according to his agreement.

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The *Court* then called on

Addison to support the plea. The plea shows that the promises declared on were made by the defendant not to pay personally, but only in his character of assignee, out of the produce of the sale, and that when his character of assignee ceased on the superseding the fiat, he was no longer bound by them or able to perform them.

LORD LYNTHURST C. B.—The fiat was superseded, and your plea is, that as you had only a right to sell as assignee, you had no longer power to sell; but you might have sold before. It appears to me an unqualified promise, and that it was entirely in consequence of it, that the plaintiff lost his right.

BAYLEY B.—It does not appear on the face of these pleadings that the defendant has not sold the property.

Judgment for the plaintiff.

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The ATTORNEY-GENERAL *against* LEONARD PETER
STAFF and PETER BRAMES.

M. S. by will bequeathed certain stock in the funds to trustees to stand possessed thereof on such trusts and for such purposes, and subject to such powers and declarations, as *J. S.* by deed, with or without power of revocation and new appointment or by will should appoint; and in default of appointment, in trust to pay *J. S.* the dividends for life, and after her decease to divide the principal among her children then living. After the

THIS was an information filed by the Attorney-General against the defendants, for having, as the executors of *Judith Staff* deceased, paid too little probate duty in respect of the probate of the will of the said *Judith Staff*, and for not having obtained probate of her will, and for duties due to his majesty, and for money due to him on an account stated.

To the four first counts of the information the defendants pleaded not guilty, and to the last three, that they are not indebted to his said majesty; and issue having been joined thereon at the trial before Lord *Lyndhurst* at the sittings after last *Trinity* term, a verdict was taken for the crown, subject to the opinion of this court on the following case.

Matthew Stainton of Isleworth, in the county of *Middlesex*, by his will duly made and published in writing, and bearing date the 19th *March*, A. D. 1821, among other things, bequeathed to *W. Hodgson, W. Day*, and *J. A. Clarke*, 4000*l.* three per cent. consolidated bank annuities, and thereby declared and directed that they should stand and be possessed thereof upon such

J. S. duly executed a deed according to the form prescribed by the will, by which deed, after reciting her desire to execute the power vested in her by the will of *M. S.*, she directed the trustees to transfer the fund to herself and a new trustee, upon such trusts, for such purposes, and subject to such powers &c., as she should by any deed, with or without power of revocation and new appointment, or by her last will, direct and appoint; with certain limitations over in default of appointment, similar to those contained in the will. Under this deed the stock was transferred into her own name and that of her co-trustee. Afterwards *J. S.* by will made by virtue and in execution of the last-mentioned power reserved to her by that deed, and of all other powers, appointed the stock to be transferred to certain persons, in trust that it might be consolidated with and become part of her residuary personal estate, and follow the dispositions thereof thereafter contained:—Held, that the deed executed by *J. S.* being an exercise of the power given her by the original will, the property became her personal estate in which she had a beneficial interest, and was as such liable to her debts, and therefore that it was liable to the payment of probate duty under 55 G. 3. c. 184. s. 38.

trusts, and for such intents and purposes, and under and subject to such powers, provisoes, and declarations as the said *Judith Staff*, whether covert or sole, and notwithstanding her coverture, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, and by her last will and testament in writing to be by her duly executed in the presence of or to be attested by two or more credible witnesses, should direct or appoint; and in default of such appointment, in trust to pay the dividends of the said three per cent. annuities to the said *Judith Staff* for life, and after her decease to pay and divide the principal equally among her children living at her decease.

The said *Matthew Stainton* afterwards died without altering or revoking his said will and testament, and after his death the said *W. Hodgson*, *W. Day*, and *J. A. Clarke*, as such trustees, became and were possessed of the sum of 3880*l.* three per cent. consolidated bank annuities, being the said sum of 4000*l.* three per cent. consolidated bank annuities (less 120*l.* like annuities sold to pay the legacy duty thereon) upon the trusts in the said will mentioned, and thereupon by a certain indenture duly executed in the presence of and attested by two credible witnesses, and bearing date the 9th day of *April* in the year of our Lord 1824, and made between the said *Judith Staff* of the first part, the said *W. Hodgson*, *W. Day*, and *J. A. Clarke* of the second part, and the said *Judith Staff* and *Leonard Peter Staff* of the third part, after reciting amongst other things that the said *Judith Staff* was desirous of executing the said power of appointment in the said will mentioned, the said *Judith Staff*, by virtue and in exercise and in execution of the power and authority, powers and authorities, given, limited or reserved to her in and by the said will of

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the said *Matthew Stainton* deceased, did direct and appoint that they the said *W. Hodgson, W. Day, and J. A. Clarke* should, as soon as conveniently might be after the execution of the said indenture, transfer or cause to be transferred the said sum of 3880*l.* three per cent. consolidated bank annuities into the names of the said *Judith Staff*, and the said *Leonard Peter Staff*, their executors and administrators, upon such trusts, and to and for such intents and purposes, and under and subject to such powers, provisoes and declarations as the said *Judith Staff*, whether covert or sole, and notwithstanding her coverture, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, and by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, to be by her respectively executed in the presence of two or more credible witnesses, should direct and appoint, with certain limitations over in default of appointment, similar to those contained in the will of the said *Matthew Stainton* above set forth.

The said *W. Hodgson, W. Day, and J. A. Clarke*, after the making of the said indenture, and in pursuance thereof, transferred the said sum of 3880*l.* three per cent. consolidated bank annuities into the names of the said *Judith Staff*, and the said *Leonard Peter Staff*, and afterwards, and after the making the said indenture the said *Judith Staff* duly made and published her last will and testament in writing, duly executed in the presence of three credible witnesses, bearing date 20 August 1830, and thereby amongst other things, by virtue and in exercise and execution of the power and authority given or reserved to her in and by the said indenture, and of all and every other powers and authorities enabling her in that behalf, did direct and appoint that the sum of 3880*l.* three per

cent. consolidated bank annuities then standing in the joint names of *Judith Staff* and *Leonard Peter Staff*, should go and be transferred to the said *Leonard Peter Staff*, *W. Sharpe*, *W. Hart*, and *J. Carter*, their executors, administrators and assigns, upon the trust and to the intent that the same might be consolidated with and become part of her residuary personal estate, and follow the dispositions thereof thereafter contained; and the said *Judith Staff*, by her last will and testament, did give and bequeath her residuary personal estate unto the said *Leonard Peter Staff*, *W. Sharpe*, *W. Hart*, and *J. Carter*, their executors, administrators and assigns, upon certain trusts and for certain purposes in the said will mentioned; and the said *Judith Staff* did also thereby make and appoint the said defendants executors of her said last will and testament; and the said *Judith* afterwards, and after the making of the said last will and testament, died without altering or revoking the same; and the defendants afterwards and after the death of the said *Judith Staff* proved her said will in the prerogative court of *Canterbury*, and took upon themselves the execution thereof, but did not pay any probate duty in respect of the sum of 3880*l.* three per cent. consolidated bank annuities, so mentioned in the said last will and testament of the said *Judith Staff*. The question for the opinion of the court is,

Whether probate duty is payable upon the probate of the will of the said *Judith Staff* in respect of the value of the said sum of 3880*l.* consolidated bank annuities. If the court should be of that opinion, the verdict is to be entered for the crown for 60*l.*; if of the contrary opinion, the verdict is to be entered for the defendants; either party to be at liberty to turn this special case into a special verdict (*a*).

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(*) See *Attorney-General v. Dimond*, ante, Vol. I. 286.

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Sir *George Grey* for the crown. By section 37 of 55 G. 3. c. 184., the first act which contains any provision as to probate duty, it is provided, "that if any person shall take possession of and in any manner administer any part of the personal estates of any person deceased, without obtaining probate of the will, or letters of administration of the effects of the deceased," within certain periods there specified, every such person shall forfeit 100*l*. Next, section 38 enacts, that within three calendar months from the passing of the act no ecclesiastical court or person shall grant probate of the will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person applying for the probate or letters of administration, an affidavit or solemn affirmation, that the estate or effects of the deceased *for or in respect of which the probate or letters of administration is or are to be granted*, exclusive of what the deceased possessed or was entitled to as trustee for any other person, and not beneficially, but including leasehold estates for years of the deceased, and without deducting any thing on account of debts of the deceased, are under the value of a certain sum. Then the words "*for or in respect of which the probate or letters of administration is or are to be granted*," imply that when a probate is applied for, it must be applied for for all the personal property to be administered by the executors under the will. In the schedule of the act, Part III. the words are "probate of a will and letters of administration, with the will annexed, to be granted in *England*;" and a general clause follows in these words: "where the estate and effects for or in respect of which such probate &c. shall be granted, shall be above" a certain value, so much. These sections, therefore, and the schedule, taken together, show that probate duty is imposed on

the property of the deceased for or in respect of which the executor, in order to clothe himself with a legal character, to enable him to collect it, applies to the ecclesiastical court for probate; so that the question here is, whether this is such personal estate as that described in the act "*for or in respect of which probate is required?*" Setting aside the peculiar circumstances of the case, and treating it as an ordinary case, in which the property is disposed of by a power of appointment, the question arises whether, if a disposition takes place by the will of the deceased, it does not require probate, and if it does, whether it must not be granted for or in respect of the estate and effects in the will sought to be administered by the executor to whom it is granted. If it is made by will, or must be made by will, or there is a provision that it may be by will, the authorities show that the will must be subject to all the incidents of any other will, including probate, and that it is completely analogous to any other will made without that power, and that neither courts of law nor equity will take notice of it till probate is taken out by the executor. *Sugden*, in his *Treatise on Powers*, (5th edit. 340,) says, (speaking of wills of married women, made under powers of this kind, "where the will relates to personalty, it must be proved in the spiritual court. This has been determined even with regard to an appointment by the will of a feme covert, who cannot in the notion of the law make a will, though a different opinion seems once to have prevailed. The courts of equity, however, will not at this day read the appointment by will till it is duly proved as a proper will in the spiritual court, nor will the probate preclude the necessity of proving the instrument as an appointment upon any claim under it in a court of equity." That passage shows that a will must be proved in the ecclesiastical court before it can


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be acted on. Again, in *Ross v. Ewer* (a), Lord *Hardwicke* says, "I am of opinion that though in the notion of law a wife cannot make a will, yet where a feme covert has a separate power over her estate and may dispose of it by will, whatever sort of writing she leaves ought first to be propounded as a will in the spiritual court; and in this case, as there is no executor appointed under this writing by the wife, that court would have granted administration to the husband with this paper or testamentary schedule annexed." Probate therefore appears necessary for property like this. It may be objected, that all that is necessary for the executor to do, is to clothe himself with the legal character of executor, and that, having done that, he may call on the trustees of the settlement for a transfer of the fund appointed by the will; but unless that position applies in all cases, it will not afford a correct rule in any. Supposing this to be a will made by a person having no other property to dispose of, and that this property were disposed of by will by virtue of a power, if the executor wishes to obtain a transfer of the fund from the party in whose name it is standing, he must go to the ecclesiastical court to propound that appointment under the power as a will, and demand probate before he can obtain a transfer of the fund. "For or in respect of" what property is he to apply for probate? It must be some property over which he has unlimited control for or in respect of which duty is claimed [*Bayley* B. By means of a power he might have control over the property in which he has no beneficial interest.] In such a case the probate duty would be returned under distinct clauses of the act. The case would be that of a common trustee. [*Lord Lyndhurst* C. B. The probate duty would be payable in respect of matter exclusive of what you may be

(a) 3 Atk. 160.

seised of as trustee. There may be nothing but what the deceased possessed as trustee, in which case, though it may be necessary to take out a probate, the executor would pay no duty.] There the executor must make affidavit that his testator had no beneficial interest. That could not be done here. But where the testator has a mere naked power, as where a property is vested in a person in trust for *A.* during his life, with a power to *B.* to dispose of it to some one else, *B.*'s executor could make such an affidavit. This, however, was an absolute interest in the testatrix, and not a mere naked power of disposition. *Palmer v. Whitmore (a)* is decisive of this case. In

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(a) The following note was kindly furnished me by the Solicitor of legacy duties. "Vice-Chancellor's court, 14 January 1832.—The Rev. *Thomas Dalton*, by his will dated 19 September 1825, after reciting that under and by virtue of an indenture dated 23 May 1809, he had the absolute power of disposing of certain trust funds, did direct, limit and appoint, will and declare, that such trust funds should be applied in the payment of certain legacies by his said will given, and appointed defendant *Millard* his executor. *Millard*, on applying for probate of the said will, included the amount of the said trust funds in the affidavit made by him in pursuance of 55 G. 3. 184. s. 38. with the other personal estate of the testator, and paid probate duty on the whole amount. The accounts of the executor were afterwards taken in this suit by the master, who reported that he had declined to allow the sum of 237*l.* 10*s.*, being the proportion of the probate duty paid in respect of the trust funds, over which the testator had the power of appointment. Defendant *Millard* then excepted to the master's report. After hearing counsel in support of the exception, and of the master's report, the Vice-Chancellor said, I think in this case the duty was properly paid. The testator had an absolute and general power of appointment, and chose to execute the power by means of a testamentary appointment, and by so exercising the power the testator has made the funds part of his personal assets. Such testamentary appointment cannot be judicially taken notice of till proved in the proper ecclesiastical court. Then what does the act require? That probate duty shall be paid 'on the value of the estate and effects for and in respect of which such probate is required to be granted.' I therefore think that the payment by the executor was right, and the exception must be allowed."

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that case a will had been made by virtue of a power of this kind, and the executor had paid the probate duty on it; a practice which, till 1830, had been universal. That was a suit to take an account, followed by a decree under which the executor carried in discharges claiming to be allowed for certain payments made. The master thought that probate duty was not payable, and refused the executor the allowance of 237*l.* 10*s.* which he had paid on that account. But the Vice-Chancellor after argument decided that that sum was payable for probate duty under the settlement, saying, the testator had a general power, and had so exercised it as to make it a part of his personal assets. Then here the probate gives a right to receive this property; it must, therefore, be that for or in respect of which probate is granted. [Lord *Lyndhurst* C. B. In this case the testatrix had an absolute power of appointment by deed in her lifetime to whomsoever she pleased. That made it her absolute property. She had a right to appoint by will not among classes of persons, but in any way she pleased; she does appoint by will, and has made it part of her residue.]

The *Court* here called on

Comyn to argue for the executors. In no case except *Palmer v. Whitmore* has the present question been raised, namely, whether probate duty is payable where the deceased had only a power of appointment. The 38th section of 55 *G. 3. c.* 184, applies only to property in which a testator was beneficially interested. The testator here bequeathed this property to trustees, giving Mrs. *Staff* only a life interest by way of annuity in the dividends. [Lord *Lyndhurst* C. B. If she had disposed of it in her lifetime by deed, absolutely as her

own property, it would not have paid duty a second time. Then is it not in the same situation as any ordinary property? She took it from the person who bequeathed it to her. Suppose that instead of creating a power by the deed, she had sold out the stock and lived on the interest of the purchase money, and then had afterwards disposed of it by will, it would have been equally liable to the duty. Then what hardship arises in it?] The executors of *Stainton's* will paid duty on this property. Then to whom was it bequeathed? to trustees, subject only to Mrs. *Staff's* appointment. She had no possession of or interest or estate in the property. The fund from which the annuity arose was in the trustees. They had the legal power over it, and she could only appoint it during her life. Then not having so done, but having by her own will made an appointment agreeably to the testator's will, it never was her property, or was she ever possessed of it. [Lord *Lyndhurst* C. B. Did not she take the legal estate out of the trustees immediately after the testator's death? she exercised her power at that time by compelling a transfer from the trustees under the testator's will, to new trustees appointed by her on trusts, subject to her power of appointment.] The deed of 9th *April* 1824, merely transferred the property to her under the trusts contained in the original will; and to protect the property from being part of her estate, it was provided, that in case of her death it should go to the surviving trustee. That would prevent it from ever becoming her property. That deed reserves the same power of appointment as is given by the original will, and transfers the fund to the donee on the trusts therein contained. Then this property never vested in her so as to become part of her estate. [Lord *Lyndhurst* C. B. If a party has a power to dispose of property *absolutely*, it is the pro-

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perty of the party having the power. It is different where the powers are very limited, as for example, to choose between *A.* and *B.*, but here she could have given it to herself at once and spent it all. She however executes a power giving it to trustees for her benefit. She might have conveyed it for valuable consideration in her lifetime, being only fettered as to the *form* of conveyance, not as to the object. *Bayley B.* She had in substance the control over the whole beneficial interest, having an absolute right of ownership if she chose to take the proper means to convey it.] Unless she reduced it into possession it would not be assets in her hands. [Lord *Lyndhurst C. B.* Did she not reduce it into possession in 1824, when she executed her power of appointment, taking the fund out of the hands of the persons who held under *Stainton's* will, and vesting it in herself and another in trust, subject to her power of appointment?] They were merely placed in the situation of the trustees under the original will. The exercise of a power of appointment and revocation is only a ministerial act, in doing which the person exercising it has no interest. [*Bayley B.* The mere execution of a power over property in which the party has no interest, is a naked execution of a power, but surely there is an interest if it is limited to such uses as you shall appoint.] Till the appointment is made, no interest exists in the appointee in the fund or property to be appointed. *Mrs. Staff* exercised the power only by becoming a trustee with another person, for the express purpose of carrying into execution the trusts of the original testator. She took no more interest than the trustee had; now that was not beneficial. Under that deed she had no power of disposition, except according to the directions of the original will; and when she died the legal estate in it survived to the trustee joined with her to protect it. Unless an

interest was conveyed to her by that deed, she had no life interest in this fund, as she made no disposition of it during her life. Had she died intestate, would the fund in question have been distributed among her next of kin by her administrator?

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[Lord *Lyndhurst* C. B. She takes a life interest during her life, but she might have taken more had she chosen. Suppose that she had thought proper, when she created these two new trustees, to make them trustees for her own absolute benefit, she might have done so. Instead of doing that, she chooses to make them trustees according to the original power of appointment, but she was not bound to adopt those powers. She had the option of making them trustees, subject to any other power or trust she might select, as for instance, for her own absolute use and benefit. But in doing what she has done she exercised a dominion over the fund. Then is not this a probate relating to the "estate and effects" of the deceased Mrs. *Staff*?] She had no such beneficial interest, not having reduced the estate into possession, and her appointee would take under the original will, which raised the power of which she was the organ only. On her intestacy the fund in question must have passed under the deed, and could not have been distributed by her administrator among her next of kin, or applied to pay her debts, nor could it be made the subject of a devastavit. [Lord *Lyndhurst* C. B. If a man has an absolute power of appointment over personal estate, is it not subject to his debts? (a)] This fund would be liable to the original testator's debts, but was purposely protected by the trust from the debts of Mrs. *Staff*, to whom the property was given. Her act in appointing being merely ministe-

(a) Sugden on Powers, 5th ed. 340, 346.

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rial, the party taking under it took it from the original power, and cannot be affected in his right by the property being taken to pay the debts of the person appointing. In *Re Cholmondeley* the crown gave up the claim to probate duty. [*Bayley B.* The power was in that case unconnected with an interest. The principle of that case was, that nothing was given out of the personal estate of the testator.]

Sir *George Grey* in reply. In the matter of Mrs. *Cholmondeley (a)*, the counsel who contended that the fund was free from legacy duty, distinguished between a mere naked power and a power coupled with such an interest as gives the party an absolute control over the property, *e.g.* as in this case, where property is given to trustees for such purposes as *A.* shall by deed or will appoint. In the latter case it is considered as vesting in *A.* an absolute property in the fund; and if the power of appointment is there exercised, it would be in the hands of the appointees applicable to the purposes to which the appointor's personal estate would be applicable, that is, in paying the creditors; the appointees being in such case considered in equity as trustees for the creditors to the extent of their claims. In *Holmes v. Coghill (b)*, the Master of the Rolls says, "Upon the second point there is an evident difference between a power and an absolute right of property, not so much with regard to the party possessing the power as to the party to be affected by the execution of it. If our attention is to be entirely confined to the power, there is no reason why the money he has a right to raise should not be considered his property as much as a debt he has a right to recover." [*Bayley B.* Therefore if you give a man power to raise 10,000*l.* and he does not raise it, is it to be considered part of

(a) *Ante*, Vol. III. p. 10.

(b) 7 Ves. junr. 504.

his property?] There is no authority going the length of saying that where no appointment is made under the power, the creditors could claim; but it appears from them that by the exercise of the power the creditor could come in, and that there being an absolute power over the fund, and an exercise of that power, the parties are instantly let in, even as against the persons in favour of whom the trust is made. In *Jenney v. Andrews* (a), the Vice-Chancellor says, "Where there is a general power of appointment by will, and an appointment made, the appointee is a trustee for creditors, but it is not for creditors at the time of the execution of the will, but at the death of the testator." Then the appointment lets in all the creditors who were then such, to claim on the appointed fund as they would have done on the residuary estate. By executing the deed of 1824 the power was gone for ever. The ancient uses in *Stainton's* will were determined (b), and by an accident, not being precisely the same with the new in all particulars, are not renewed, but take effect in part only, and under the deed of 1824.

The only remaining question is, the effect of the deed of 1824 on this fund. It is said that as *Mrs. Staff* did not call on the trustees of *Stainton's* will to transfer the fund into her sole name, but only into the name of herself and a trustee who survived her, the legal estate then vested in him. But the circumstance of a fund being placed in the names of trustees for the use of a person beneficially interested will not exempt it from probate duty; for if it did, no duty would be payable on money which at the request of the party beneficially interested has been secured on a mortgage taken by the trustees in their own names, subject to the usual declaration of trust, that the mortgage money

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(a) 6 Madd. R. 264; see *ante*, Vol. III, 15.

(b) Sugden on Powers, 5th ed. 347.

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belongs to other parties. If such money does not form part of the estate of the latter, and at their deaths is not subject to probate duty, the legacy duty might always be evaded by keeping the money in the names of trustees. [*Bagley B.* Had she made no appointment would this fund have been burdened with her debts?] There is no question here as to that; but the decisions show that where no appointment is made the persons who take in default of such appointment, would take subject to the claims of creditors; and some of them appear to show that they would have the same right even if no appointment were made. Limitations might exist to carry the fee, if the power was not executed, but this deed does not give Mrs. *Staff* a limited interest, *e. g.* for life, but the co-trustees are to hold the corpus of the property, subject to her absolute control. She might, in the formal manner required by the deed, compel her co-trustee to transfer to herself or a stranger. The having interposed the trustee in this case would not affect her right so to do any more than if done to bar dower, in which case it would not affect the descent of the fee. Besides, she having by her will consolidated this fund for all other purposes with her residuary personal estate, liable to the claims of her legatees and creditors, how can it be exempted from probate duty?

The *Court* said, that though they entertained little doubt, they wished to see the case of *Palmer v. Whitmore*, and their judgment was next day delivered in the following terms by

Lord LYNDEHURST C. B.—We are of opinion that the estate of *Judith Staff* is subject to probate duty in respect of the property in question. *Matthew Stainton* by his will bequeathed the sum of 4000*l.* three per

cent. consolidated bank annuities to trustees, subject to a general power of appointment in *Judith Staff*. Shortly after the death of *Matthew Stainton*, the testatrix *Judith Staff* executed the power of appointment by appointing the property to herself and another person, subject to a new power of appointment created by herself. That second power of appointment was also a general power of appointment corresponding in substance with the former power. The second power of appointment was executed by her will. The property by the execution of the power of appointment became liable to her debts, and became her personal estate. She had an absolute control over it. She was not a mere trustee, but had a beneficial interest in the property. The case, therefore, comes within the very words of the 38th section of 55 G. 3. c. 184., and clearly within the spirit and meaning of it.

We are therefore of opinion that the probate duty attaches.

In the case of *Palmer v. Whitmore* the same question appears to have been decided by the Vice-Chancellor upon exceptions to the master's report, and there was no appeal from that decision. There must therefore be

Judgment for the crown.

DOE *against* HARE.

TRESPASS for mesne profits accruing between 5 June 1830, the day of the demise, and 4 June 1832, when the sheriff delivered possession under the ejectment. At the trial at the *Middlesex* sittings after last

A plaintiff recovered in ejectment on a demise laid on 5 June. In the action for mesne profits, the occupation being proved from that day, the defendant showed that a sum being due on 24 June for ground-rent, was paid by him:—Held, that he might deduct that sum from the damages recovered for the mesne profits, and that the plaintiff could only recover the costs taxed between party and party.

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term, before Lord *Lyndhurst*, the defendant was proved to have occupied the plaintiff's premises for the period laid in the declaration, and to have paid 18*l.* 10*s.* for a quarter's ground-rent due 24 *June* 1830, as well as other sums for two years' ground-rent accruing due during his occupation. The verdict was for the plaintiff, for the mesne profits proved, deducting the sums so paid by the defendant.

Watson for the plaintiff moved to increase the verdict, by adding the 18*l.* 10*s.* deducted as paid for the first quarter's ground-rent. The defendant either came wrongfully into possession on 5 *June*, or being in rightful possession before under a tenancy then expiring, became a wrong-doer from that day. In the first case the defendant could not, by volunteering a payment of the ground-rent, be entitled to use it in reduction of the plaintiff's claim for occupation for a subsequent period; and in the second, the defendant would have paid it on his own account in respect of his previous use of the premises.

LORD LYNDHURST C. B.—The defendant was obliged to pay the ground-rent demanded of him, and did not make a voluntary payment in order to charge the plaintiff with the amount.

BAYLEY B.—There is no evidence that the defendant occupied from *Lady-day* 1830, or before 5 *June* in that year. His property on the premises would be liable to distress for the ground-rent due after the latter date. The real value of the premises on the 5th *June* to him, as to any other occupier, must be calculated minus that sum which he was so obliged to pay for ground-rent. It was an outgoing falling due during the time of his occupation, and he could not exonerate

himself from liability to pay it. As the plaintiff, if in possession, must have paid it, he is not hurt by the defendant's having done so. As to extra costs, only such costs are recoverable as would on taxation be payable between the parties.

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Rule refused.

GUY *against* NEWSON.

COVENANT on an agreement under seal for the payment of 220*l.* with 5*l.* per cent. interest, by quarterly instalments. Three instalments were sought to be recovered from the defendant with interest due *Lady-day* 1833. Plea, discharge of defendant under the insolvent debtors' act on 23 *August* 1832. Repliation, traversing that discharge.

At the trial before *Gurney B.* at the *London* sittings after last *Trinity* term, the agreement declared on was produced by the plaintiff, dated 19 *March* 1831, between the plaintiff of the first part, *G. K. Long* of the second part, *J. A. Avon* of the third part, and defendant of the fourth part; whereby, after reciting that the plaintiff and *Long* had carried on business together as copartners, and had agreed to put an end to the copartnership, on the sum of 225*l.* 4*s.* 6*d.* being paid or secured to the plaintiff, and that the plaintiff had agreed to assign the debts owing by the partnership to *Long*, who had undertaken to pay all the debts due from the partnership to other persons: It was witnessed, that in consideration of 5*l.* 4*s.* 6*d.* paid to the plaintiff by *Long*, and also in consideration of the several covenants made by *Long*, *Avon*, and the

The plaintiff and one *Long* being about to dissolve partnership, the plaintiff, in consideration of 225*l.* 4*s.* 6*d.*, assigned the debts owing to the partnership to *Long*, who, with *J. A.* and the defendant, in consideration thereof, severally and respectively covenanted with the plaintiff, that they or some or one of them should and would pay the 225*l.* 4*s.* 6*d.* by instalments: Held, that this was not a collateral engagement by the defendant to pay if *Long* did not, but an absolute covenant to pay at all

events; and was determined as to instalments becoming due subsequently to his discharge by the defendant's discharge under the insolvent act, 7 *G.* 4. c. 57.

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defendant, thereafter contained, for the payment of 220*l.* and interest, and their indemnifying the plaintiff against all actions &c. in respect of the partnership, the plaintiff assigned the debts due to the partnership to *Long*, and in consideration of the premises, *Long*, *Avon*, and the defendant did thereby for themselves severally and respectively, and for their several and respective heirs, executors, &c. covenant and agree with the plaintiff, his executors &c., that they, *Long*, *Avon* and the defendant, or some or one of them, or of their executors, &c. should and would pay and cause to be paid to the said plaintiff, his executors and administrators, the sum of 220*l.* in manner following; that is to say, the sum of 10*l.* on *Midsummer-day* then next, and the like sum of 10*l.* on each succeeding quarter day of payment of rent in the year, until the whole of the said sum of 220*l.* should be fully paid; and also should and would in the meantime, and until the same should be so fully paid, pay or cause to be paid to the plaintiff, his executors or administrators, interest from the day of the date of the instrument upon so much of the said sum of 220*l.* as should remain unpaid, at the rate of 5*l.* per cent. &c. such interest to be payable on each of such succeeding quarter days. The plea having been proved, the plaintiff was nonsuited, with leave to move to enter a verdict for 30*l.* the amount of the three instalments.

John Jervis moved to set aside the nonsuit. Is this a debt from which the defendant can be discharged under the insolvent debtors' act? The defendant's undertaking was intended to be contingent only, and collateral to that of *Long* the principal. The 51st section of 7 *Geo.* 4. c. 57. applies in terms to sums "payable by way of annuity or otherwise at any future time or times." "Otherwise" applies to nothing but a grant of an annuity or security of like nature,

and not to the payment of a fixed sum. That appears from the mode in which the value of the sum payable is directed to be ascertained, *Winter v. Mouseley* (a). [Bayley B. It was there contingent whether any sum of money would be payable or not. An annuity is no debt, and is not payable at all events.] Section 47 is directed to debts and sums of money due and claimed to be due from the prisoner at the time of filing his petition, or for which persons who claim to be creditors shall have given credit to the prisoner before the time of filing his petition and not then payable. Neither case occurs here; the credit was clearly given to Long, Avon and defendant were sureties only, and no debt was due from defendant to plaintiff at the time of filing the petition. The words of the bankrupt act, 7 Geo. 1. c. 31. "debts payable at a future day," resemble those of "debts and sums of money not payable at the time of filing the petition." Then *Ex parte Adney* (b) decided on the former act applies. There A. before his bankruptcy, in consideration of 11. 10s. 7d. received from B., undertook in writing to make himself liable for due payment of a note on which H. was then indebted to B., B. thereupon consented to furnish H. with more goods, and A. became bankrupt before the note was due. The undertaking of A. was held collateral only in case H. should not pay the note when due; so that being contingent only, it could not be proved as a debt under A.'s commission. [Bayley B. That was only a guarantie; B. undertook not that he himself should pay, but that H. should.]

BAYLEY B.—Suppose there had been no insolvency, and that the plaintiff had sued on this instrument, would it have been necessary to have alleged a pre-

(a) 2 B. & Ald. 802.

(b) Cowp. 460.

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vious demand made on *Long*, and nonpayment by him? For if that averment was unnecessary, the undertaking is not collateral. If one of two joint or several obligees pay the debt, it is gone. It is not inconsistent with the defendant's intention to bind himself to pay the debt of another, that he should bind himself absolutely to pay it.

The argument in this case has raised no doubt on my mind as to the mode of disposing of it. The partners are about to separate. *Long* is to take the partnership debts, and the plaintiff is to be paid a sum of money at all events. He accordingly takes a security from *Long*, *Avon* and the defendant, by which the two latter severally and respectively covenant with the plaintiff, that they or some or one of them should pay the plaintiff that sum by certain instalments. That was an absolute engagement on the part of each of them that the money should be paid, and is not a mere collateral undertaking to pay if *Long* did not. That being so, it was a debitum in præsentì solvendum in futuro, and as such, a debt to which the defendant's discharge under the insolvent debtors' act was a bar.

VAUGHAN B.—I think this is clearly an absolute covenant to pay at all events.

The other barons concurring,

Rule refused.

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FISHER and Others *against* BEGREZ.

ON the third day of the term, *Petersdorff* for the defendant, moved for a rule calling on the plaintiff and the sheriff of *Middlesex*, to show cause why the ca. sa., on which the defendant had been arrested, should not be set aside and the money paid by him to the sheriff, under protest, should not be returned, on the ground that the defendant was privileged from arrest. The facts disclosed by the affidavits of the defendant were, that he was a *Belgian* in the service of the *Bavarian* ambassador, as first singer at his chapel, as well as singer of solos in the masses celebrated there, and that he believed himself the only singer there competent to perform solos. That he was bound to attend there on *Sundays* and *Good Fridays*, and, except for a few weeks when ill, had for the last fourteen years attended the chapel on those days, and on all other days when required by the ambassador or the first priest. That he received for his services 30*l.* per annum, paid quarterly by the ambassador's secretary. That the ambassador was a roman catholic, and that according to the ritual of his religion it is necessary to the due celebration of divine service and mass, that there should be a person to officiate as the deponent hath done, and still does as first chorister. That the chapel was the ambassador's domestic chapel, there being no other in this country which he could conveniently attend, and that the defendant is his domestic servant for the aforesaid purposes and in respect of his situation, and is not a trader within the bankrupt laws. The Court ordered that the sheriff retain in his hands the sum levied by him in this cause until their further order.

The privilege from arrest enjoyed by the domestic servant of an ambassador, is the privilege not of such servant, but of the ambassador. Therefore, where a person not sworn to be such a domestic servant, and whose duties may or may not be of a domestic nature, is arrested, but neither the ambassador nor any one on his behalf applies for his liberation, the court will not discharge him out of custody unless he shows a clear case of domestic service.

Follett for the plaintiff showed cause. Applications

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of this kind since stat. 7 Ann. c. 12. s. 5. have failed, because made to resist payment of debts on the ground of colourable acts of service. The statute is only declaratory of the common law. The defendant has no real duties to perform except singing. Now it appears by the plaintiff's affidavit, that that is the defendant's profession, and that he is also a teacher of singing and music, selling the copyrights of his own musical compositions, and making a large income by his business. It is also sworn that the salary of 30*l.* a year is received, not from the ambassador's secretary, but from one *Jefferson*, who receives the admission money at the chapel doors, out of the money so received. The *Bavarian* minister refused to interfere, none of his household make any affidavit, and the chapel is at a distance from his residence. The defendant did not come here with the ambassador, but being settled here, procures this situation in order to enjoy this privilege. On his arrest, he said it was inconvenient, as his benefit at the opera-house was fixed for the evening. The small consideration paid for singing so much in the chapel, when his exertions are so much more highly paid for elsewhere, shows that his situation there is used colourably, in order to secure himself from process of his creditors. In *Lockwood v. De Coysgarne* (a), a domestic physician to a foreign minister was refused his privilege on that ground. Besides, the defendant has asked how it could be supposed he would take the situation at so small a salary, were it not for its attendant privileges.

Platt for the sheriff. The defendant, in answer to a question by the sheriff's officer, said, that he did not know that he should make any application to the court unless he heard from him that evening. No such communication being made, the sheriff paid over to the

(a) 3 Burr. 1676.

plaintiff the levy money. The privilege therefore, if existing at all, has been waived.

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F. Pollock and *Petersdorff* for the defendant. The application is not too late, for the money was not paid over till 4th *November*, notice of the motion having been given on 23d *September*. But lapse of time will not set up proceedings in themselves illegal and void. [Lord *Lyndhurst* C. B. Has not the defendant waived his privilege by what he said to the officer?] A party may waive his privilege, and if money is paid over by the sheriff to the creditor in consequence of that waiver, can the defendant come here and claim it again?] Loose conversation will not be strained into a waiver. In *Novello v. Toogood* (a), the distinction between claiming protection for the property and for the person, as in this case, was admitted by the whole court. The chapel is not the less the chapel of the ambassador, because it is made available to others. That is the case with the royal chapels in this country. The registering of the defendant's name with the sheriff is a check on other persons claiming the privilege.

LORD LYNTHURST C. B.—I am not satisfied on these affidavits that the chapel in question belongs to the *Bavarian* ambassador, though he has a seat there; I should infer the contrary, from the fact that money is received at the door, out of which the expenses, including the singing of the defendant, are paid. But this application is not made by the ambassador himself, or by his authority. No person acknowledged to be in his employ makes any affidavit, and the person who receives the money at the chapel door is silent. I feel satisfied that the service set up by the defendant is colourable only. The defendant is sworn to be a

(a) 1 B. & Cr. 554.

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public singer at the opera, as well as a teacher of music and singing, and a composer, publisher and seller of music, making a large income by those pursuits. He also said, "Do you suppose I should have accepted the place but for the protection it would afford me?"

BAYLEY B.—The privilege sought to be enforced is not the privilege of the servant, but of the ambassador. The defendant, if hired at all by the ambassador, must have known how he was hired; but that is not sworn. Though he says he may be called on at any time, he shows no actual instance of being called on by the ambassador to perform any services. All these circumstances were peculiarly within his own knowledge. Nor is the application made by or at the instance of the ambassador, or by the authority of any of his establishment.

GURNEY B.—The defendant may try the question by action on the case, if so advised.

Rule discharged with costs (a).

(a) See same case in a prior stage, *ante*, Vol. III. 184.

BLACKBURN against PEAT.

The construction of *Reg. Gen. M.* 1 W.

4. No. 8. [*ante*, Vol. I. 160.] is, that an attorney residing

out of *London*, but within ten miles, must enter in the book at the office of the clerk of the pleas, some proper place, within one mile of that office, where notices &c. may be served.

Pleadings are within that rule.

DEBT for goods sold. It appeared from the indorsement on the writ, that the residence of the plaintiff's attorney was at *Ilford* in *Essex* (seven miles from *London*). His name and place of abode were so

entered in the master's book, at the office of the clerk of the pleas; but no entry appeared there of any "place in *London*, *Westminster*, or *Southwark*, or within one mile of the said office, where he might be served with notices &c." pursuant to *Reg. Gen. Mich. 1 Will. 4. No. 8.* [Vol. I. p. 160.] The declaration was delivered on *24th October*, with a demand of plea; within the four days for pleading, viz. on the *28th*, the defendant's attorney stuck up a copy of a plea of nil debet in the office, entered the plea in the plea book, and at four o'clock put a copy of the plea in the two-penny post, directed to the plaintiff's attorney at *Ilford*, with notice that the plea was in the office. This did not reach him at *Ilford* till the morning of the *29th*, after the clerk had left that place, in order to sign judgment. Judgment was signed on the *29th* for want of a plea. Defendant first knew of it by service of notice of taxation on *5th November*. A rule for setting aside this judgment for irregularity with costs, on the ground that before it was signed a plea was in the office, was obtained on *6th November*.

Heaton showed cause. By the general rule cited, "every attorney admitted in this court, and residing in *London* or within ten miles of the same, shall forthwith enter in the book, kept for that purpose in the office of the clerk of the pleas, in alphabetical order, his name and place of abode, or some other proper place in *London*, *Westminster*, or the borough of *Southwark*, or within one mile of the said office, where he may be served with notices, summonses, orders and rules in causes depending in this court." The plaintiff's attorney has complied with the alternative in the rule, by giving his place of abode within ten miles of *London*. He had an option to have given a proper place within one mile of the office, but having complied with the

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object of the rule, *viz.* that he should enter in the book a known place within ten miles, where notices may be served, he was not driven to the hardship of having an office of his own in town, or to employ an agent there. This rule seems to be grounded on *Reg. Gen. K. B. Hil. 8 Geo. 3. Tidd*, 9 ed. 71; as to which Mr. Justice *Aston* says, in *Lofft*. 357, "There are many attornies who have no fixed certain place of residence. Therefore it was that such place where he might be served, though not his actual place of abode, was mentioned in the rule; but where the name and place of abode is entered, service at that place is the proper service." At all events, this rule does not apply to the delivery of pleadings.

Hoggins was heard in support of the rule.

LORD LYNDHURST C. B.—The distinction contended for between the service of pleadings and notices, does not exist, the inconvenience intended to be obviated by the rule cited, being precisely the same in both cases. On the other point, the rule clearly means that every attorney residing in *London, Westminster, or Southwark*, must enter in the master's book his place of abode, or some other proper place within one mile of the office where he may be served with notices &c., and that where he does not reside in *London*, but within ten miles, then he must specify some proper place within one mile of the office. It never could have been intended that notices &c. should be served at any distance round *London* less than ten miles.

BAYLEY B.—The object of the rule clearly was, that parties who were under obligation to serve notices, orders, summonses, &c. should not be obliged to go into the country to do so, but that the attorney to be served should name a place in *London*, or within

a mile of the office where such service might take place. He has thus an option of having notices left at his abode, or at a proper place named by him in *London &c.* For the latter words apply as well to the attorney's place of abode, as to the "other proper place." The master certifies that in practice, attorneys resident within ten miles of *London* fix some coffee-house &c. within a mile of the office where notices may be left. As to costs, the attorney does not allege that he was misled by relying on a different construction of the rule cited.

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BOLLAND B.—The rule contemplates two classes of attorneys, those who live in *London, Westminster, or Southwark*, and those who live within ten miles of *London*. The first class may enter their names and places of abode within *London &c.*, but the latter must enter a place within one mile of the office.

Rule absolute.

HAMBER *against* PURSER.

ASSUMPSIT by a messenger against the sole assignee of a bankrupt, under a commission issued pursuant to 6 *Geo.* 4. c. 16. for money paid in advertising a third meeting of creditors, and for hire of the room where it was held. At the trial before the sheriff, pursuant to 3 & 4 *Will.* 4. c. 42. s. 17., the plaintiff put in a letter from the secretary of bankrupts in 1819, recognizing the plaintiff's appointment to a then existing hiring a room for them to assemble in, it is sufficient to prove the plaintiff's appointment, and that the expenses incurred by him were reasonable, without proving express employment or recognition of him as messenger by the assignee.

In an action by a messenger to a commission of bankrupt, against the assignee, appointed under 6 *Geo.* 4. c. 16. to recover the costs of advertising a meeting of creditors, and of

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ing list of commissioners of bankrupt. The proceedings under the commission were put in, and a taxed bill of costs, in which the charges claimed were allowed, and the fees due to the plaintiff before the choice of assignees were deducted, was proved. The defendant's solicitor admitted that the business was done. The plaintiff had a verdict for 5*l*.

Lloyd moved to set aside that verdict, and for a new trial. In order to charge the defendant personally, the plaintiff was bound to prove a privity of contract with himself, either by the defendant requesting the plaintiff to act in that commission, or recognizing him as messenger therein. The remedy, therefore, was in the court of review.

LORD LYNTHURST C. B.—The assignee must have known that what the messenger did was necessary to be done. Then it was done at the assignee's expense, and the taxation shows that the charges are proper.

BAYLEY B.—As it is not disputed that these were necessary acts, the assignee was liable for the costs of them. He is not shown to have cautioned the messenger against incurring them.

GURNEY B.—The plaintiff was recognized as messenger by the commissioners having taxed his bill. The acts for which he seeks to recover must have been all done before the third meeting, before which it could not be ascertained whether the estate was solvent or not.

Rule refused.

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CHAPPEL *against* HICKS.

BARSTOW had obtained a rule to set aside a second inquisition, executed after a judgment by default, on the ground that though the building for which the action was brought was proved to be inferior to that contracted for, the sheriff's jury had given a verdict for the whole sum stipulated by the contract to be paid. There was a special count on the contract, and a common indebitatus count for work, labour and materials.

Bompas Serjt. showed for cause, that the plaintiff was entitled to recover on the special contract, and that the alleged inferiority of the work was only the subject of a cross-action.

LORD LYNTHURST C. B.—The plaintiff may recover on the common counts for the labour he has performed, but cannot recover on the special contract, unless it was executed in the manner agreed on. Suppose, on a contract to build a house of *Baltic* timber, or teak, it should be built of *Virginian* pine, the builder can have no claim to recover for more than the work and materials. It is not reasonable that a party who has not performed his contract should have the benefit of it, and that the party contracted with should be driven to his cross-action for the injury sustained by the other not having performed the work according to his agreement.

BAYLEY B.—After much contrariety of opinion, the rule was settled in *Street v. Blay* (a), that if work con-

Where work was not duly performed according to a special contract, and there is a common count for work, labour and materials, as well as a special count, the defendant may prove the inferiority of the work and materials, and the plaintiff will only be entitled to recover on the common count for so much as the work, labour and materials are worth.

(a) 2 B. & Adol. 456; see *Allen v. Cameron*, ante, Vol. III. 907.

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tracted for is not done according to contract, the party who contracted to perform it can only recover the value of the work and materials supplied.

Per Curiam—Rule absolute.

FISHER *against* PAPANICOLAS.

The directions of *Reg. Gen. Hil. 2 W. 4. No. 72.* should be strictly complied with. Therefore when a cognovit or warrant of attorney is executed by a defendant who is in custody on mesne process, the attendance of an attorney who has been requested to attest the execution by the clerk to the defendant's attorney, will not suffice, though the defendant make no objection at the time; for he is not named by nor does he attend at the defendant's request.

ASSUMPSIT by the indorsee of a bill of exchange against the acceptor.

Archbold obtained a rule to show cause why the cognovit given by the defendant, while in custody under mesne process, should not be delivered up to be cancelled, no attorney named by the defendant and attending at his request having attested its execution, pursuant to *Reg. Gen. Hil. 2 W. 4. No. 72. (a).* The affidavits distinctly showed, that before signing the cognovit the defendant had consulted his attorney, who had read it over and advised him to give it, but being out of the way when the defendant was required to sign it, *Barratt*, a clerk in his office, asked *Mason*, another attorney, to attend the execution in

(a) *Vis.* No warrant of attorney to confess judgment, or cognovit actionem, given by any person in custody of a sheriff or other officer, upon mesne process, shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and declare himself to be attorney for the defendant, and state that he subscribes as such attorney. —See *ante*, Vol. II. p. 347.

Semble, that the attorney for the defendant, who subscribes his name as a witness to the execution of the *cognovit*, should in writing thereon declare himself to be attorney for the defendant, and that he subscribes as such pursuant to the rule.

his stead, on the defendant's behalf. *Mason* accordingly attended, nor did the defendant object when he was told that *Mason* attended in lieu of his attorney, who was unavoidably absent. The defendant executed the cognovit, and *Mason* "subscribed his name as a witness to the due execution" of it, but refused to "declare himself to be attorney for the defendant, and to state that he subscribed as such attorney," pursuant to the terms of the rule, saying, he did not consider himself such. *B.*, the clerk, also subscribed the cognovit. No proceedings had been taken on it.

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John Williams showed cause. Under the circumstances, the rule cited has been substantially complied with. It has only extended the former rules of K. B. and C. P. relating to warrants of attorney, so as to include cognovits. The former decisions, therefore, apply. *Osborne v. Davis* (a) is a much stronger case. There the defendant being in custody on mesne process, confessed a warrant of attorney in the presence of an attorney on his behalf, who was, however, a total stranger to him, being introduced by the plaintiff's attorney, who refused to give time to send to another part of the town for the defendant's attorney; but the court held the warrant of attorney valid. That case was cited in *Walker v. Gardner* (b), without being overruled; and though in the argument of the latter case it was attempted to distinguish between the words of the present rule and of that of *Hil. 14 & 15 Car. 2. r. 4.* no distinction, in fact, exists between them, for they are similar, except in the latter words, viz. that the attorney shall declare himself &c. Now those words are only directory, and may be complied with orally, it not being ordered that any written declaration should be made on the cognovit. In *Walker v.*

(a) 4 Taunt. 797.

(b) 4 B. & Adol. 371.

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Gardner no attorney was present when the defendant executed the warrant of attorney, except one not known to or sent for by the defendant, but proposed by the plaintiff's attorney to read over the warrant of attorney to the defendant, and attest it on his behalf; and the court held the warrant void; but the attorney was there introduced by the party to be benefitted by the execution.

F. Pollock and *Archbold* contra were stopped by the court.

BAYLEY B.—I am of opinion that the judgment and execution on this cognovit should be set aside, on the ground of the non-compliance with the rule cited. My judgment proceeds on the plain language of the rule, and it is our duty to act on its obvious construction, without entering into discussion whether what has been done in this case is equivalent or not to the protection intended to be conferred on defendants by it. It is to be observed, that by the terms of it not only is an attorney to be present for the defendant, but he is to be expressly named by him and attending at his request. These words are important, and have a clear and plain meaning. The only attorney attending the execution of the cognovit is *Mr. Mason*. Now is he expressly named by the defendant, and does he attend at his request to inform him of the nature and effect of the cognovit, before it is executed? There is no evidence in the affirmative, and it seems to me that the contrary is distinctly proved, he having attended in literal and not in substantial compliance with the rule, viz. at the request of the clerk *Barratt*, without having ever been named by the defendant. It has, however, been said, that according to *Osborne v. Davis* the words of this rule will be satisfied, if an attorney be present who is adopted by the defendant at the time of the execution,

though not previously named by him, and not attending at his request. That case is no authority here, for *Reg. Gen. of C. P. Hil. 14 & 15 Car. 2.* only requires the warrant of attorney to be "taken in the presence of an attorney for the defendant, which attorney shall then subscribe his name thereto." It does not appear from the report that the general rule was looked into at that time. *Walker v. Gardner* does not go the full length of this case, for there the attorney was brought in at the instance of the attorney for the plaintiff, and not, as here, at that of the clerk to the defendant's own attorney. But there is no sound distinction between that case and the present, as both vary from the rule. Had *Mason* attended at the defendant's request, made under the suggestion of *Barratt*, that would have sufficed. Stopping therefore at that part of the general rule cited, I am of opinion that this cognovit is of no force; and it is unnecessary to decide whether the latter part of the rule be directory or not.

VAUGHAN B.—This rule was neither literally nor substantially complied with. By it the former rules of *Hil. 14 & 15 Car. 2.* and *Easter 4 Geo. 2.*, relating to warrants of attorney, were extended to cognovits; and it appears to me that in framing the present rule it was distinctly in contemplation to give the defendants the benefit of every part of it. It seems to me necessary that it should appear on the face of the instrument that the party attesting the signature is the defendant's attorney, or it might be always made a question whether at the time of subscribing he declared himself to be such attorney, and subscribed as such. The rule should be interpreted favourably to the protection of defendants.

BOLLAND B.—It has been argued that some of the terms of this rule are directory and matter of form only;

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but I think that the whole of it is entirely matter of substance, the object being, by the salutary precautions there provided, to prevent a party in custody from being imposed upon. Though no fraud is imputed in this case, we sit here to decide on the true construction of this rule. By it the defendant, on executing the cognovit, is to have the protection of an attorney named by himself, and attending at his request, to advise him on the terms. Now *Mason* states that he refused to declare himself to be the defendant's attorney, not considering himself to be so. Were it necessary to decide whether the declaration of the attorney, that he is attorney for the defendant, and subscribes as such, might be verbal only, or must be in writing, I should say that it must be in writing; because if an attorney takes on himself to act as such, it ought to be in the power of the court to ascertain that fact by a written document, without leaving the question whether he so acted to parol testimony.

GURNEY B.—The rule should be strictly adhered to. Now in this case the contrary appears.

Rule absolute.

JONES against ROBERTS and Another, Executrixes.

Assumpsit
against execu-
trixes, for work

ASSUMPSIT for work and labour done for the testator, *G. Roberts*, by the plaintiff, as an attorney. and labour done for the testator. Plea, that a judgment had been obtained against the testator in his lifetime, and that the defendants had fully administered &c., except as to chattels of small value, not sufficient to satisfy the judgment. Replication, that the testator paid a large sum, to wit, 200*l.*, in full satisfaction and discharge of the debt recovered, and of the judgment, and that the defendants deceitfully and with the intention to deceive and defraud the plaintiff of his damages, have deferred and still do defer procuring acknowledgment of satisfaction to be entered of the said debt, or to be released therefrom, and still permit the said judgment thereon to remain in full force. Rejoinder, traversing the payment of the said sum in full satisfaction and discharge of the debt recovered, and of the judgment, was held bad on demurrer; for the material fact to be traversed was the keeping on foot the judgment by fraud; whereas the payment in satisfaction was immaterial and not traversable, being mere inducement.

Pleas: 1st, the general issue; 2dly, that in the testator's lifetime a judgment was had and obtained by *R. B. C.*, *D. M.*, *R. C.*, and *J. L. J.*, against the said testator, for a debt of 200*l.*, and that the defendants had fully administered &c., except as to goods and chattels of small value, not sufficient to satisfy the judgment.

Replication to special plea: That *G. Roberts*, in his lifetime, paid to the said *R. B. C.*, *D. M.*, *R. C.*, and *J. L. J.*, a large sum of money, to wit, 200*l.*, in full satisfaction and discharge of the said debt so by them recovered against him as aforesaid, and of the said judgment so as aforesaid had and obtained for the same; which said sum the said *R. B. C.*, *D. M.*, *R. C.*, and *J. L. J.*, then and there had and received from the said *G. Roberts* in full satisfaction and discharge of the said debt by them so as aforesaid recovered, and of the said judgment so as aforesaid had and obtained for the same; but the defendants deceitfully, and with the intention to deceive and defraud the plaintiff of the damages by him sustained by reason of the premises in the said declaration mentioned, have hitherto deferred and still do defer procuring acknowledgment of satisfaction to be entered of the said debt by the said *R. B. C.*, *D. M.*, *R. C.*, and *J. L. J.*, so as aforesaid recovered against the said *G. Roberts*, or to be released therefrom, and still permit the said judgment thereon to remain in full force and vigor, to the intent aforesaid.

Rejoinder as to so much of the replication as relates to the judgment, that *G. Roberts* did not pay to the said *R. B. C.*, *D. M.*, *R. C.*, and *J. L. J.*, the said sum of money in the said part of the said replication mentioned, or any part thereof, in full satisfaction and discharge of the said debt so by them so as aforesaid recovered against him, and of the said judgment so as aforesaid had and obtained for the same.

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General demurrer to this part of the rejoinder, and joinder.

The following points were marked for argument in the paper books on behalf of the respective parties. For the plaintiff, that the rejoinder was bad, for not traversing the fraud in keeping on foot the judgment, instead of merely traversing the payment and satisfaction of the judgment; the fact of the defendant's having fraudulently kept on foot the judgment being the material allegation in the replication. For the defendant, that the rejoinder was sufficient, and that the traverse of the payment in discharge of the judgment is proper, and the only fact that could properly have been traversed, being the gist of the replication. That the replication would not be sufficient without that or some other averment to show the judgment satisfied; for without that it could not be an answer to say that the executrix fraudulently neglected to cause satisfaction to be entered on the judgment, and permitted it to remain in force. Nor would it signify what intention the defendants had for not entering satisfaction; nor would it have sufficed to have traversed the fraudulent neglect of the defendants to enter satisfaction, because, if it was satisfied, defendants could not avail themselves of it, whether satisfaction was entered or not; and if they had traversed that fact they must have admitted the judgment to have been satisfied.

Lloyd for the plaintiff, in support of the demurrer. Has the defendant, by traversing the payment in satisfaction of the debt recovered, selected and traversed the material fact? Now it was immaterial how the judgment was satisfied, if the defendants, by neglecting to traverse the fact that it was kept on foot by fraud, admit it; for then the defendants must also admit that the judgment was satisfied in some way. Thus in

Serjt. *Williams's* notes to *Hancock v. Proud* (a) it is said, "These words, 'that the defendant defers procuring acknowledgment of satisfaction with the intention to defraud,' are the material part of the replication; and it seems that the payment of the money in satisfaction is only inducement, and not traversable." For this position he cites *Veale v. Gatesdon* (b), and *Beaumont's* case (c). The latter case was an action of debt against an executor, in which the defendant pleaded several judgments in bar &c. Plaintiff replied that the judgments were satisfied and kept on foot by covin to deceive the plaintiff. Defendant traversed the satisfaction of the judgments. Demurrer by plaintiff, because the satisfaction was only an inducement to the fraud and covin; but inducement can never be traversed, and judgment was accordingly given for the plaintiff. Now here the rejoinder is, that the defendant's testator did not pay to the judgment creditors the said sum of money, or any part thereof, in full satisfaction and discharge of the debt by them recovered against him, and of the judgment obtained for the same. Then it is not even denied in the rejoinder that the judgment was not satisfied in some manner, *e.g.* by delivery of goods &c. The defendants therefore admit that it was satisfied, as well as that it was kept on foot by fraud. They should have traversed the latter point, which was the material fact to put in issue. Nor would that have concluded them from traversing the other fact of satisfaction, or any other fact, only tending with others to that issue (d).

J. Jervis appeared in support of the rejoinder.

(a) 1 Saund. 334, n. (9).


(b) Sir W. Jones, 92, 5th Resolution.

(c) Latch, 111.

(d) See *Bardons v. Selby*, Vol. III. 430, S. C.

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BAYLEY B.—Suppose that the testator had paid any sum short of the 200*l.*, that would not be a satisfaction of the judgment (a). On principle, as well as the case cited from *Latch*, this rejoinder is bad.

The Court gave leave to amend, on payment of costs.

(a) See *Thomas v. Heathorn*, 2 B. & Cr. 477; *Fitch v. Sutton*, 5 East, 230.

G. R. SMITH *against* SMITH and Others.

G. R. S. having advanced money to M. received from him, by way of security, an assignment of his equitable life interest in certain stock, standing in the names of three trustees under a marriage settlement, and in a mortgage vested in the same trustees. The solvency of M. becoming doubted, one of the trustees and a relation of G. R. S. spoke to him on the subject, when

G. R. S. in the course of the conversation, and without any view of giving validity to the security he held, told him that he held the above-mentioned assignment as a security for his advances. M. having afterwards become bankrupt, Held, that this statement, though made to a person who was not the acting trustee, sufficed to prevent the stock and mortgage from being in the order and disposition of M. at the time of his bankruptcy, and consequently from passing to his assignees.

Only one counsel on each side will be heard on a case reserved for the opinion of this court, by the judge sitting alone on the equity side.

THIS cause had come to a hearing on the equity side of the court. The facts were, that in 1829 *Maberly* was considerably in debt to G. R. Smith for money lent in and previously to that year. By deed of 2d June, in that year, *Maberly* assigned to G. R. Smith, as security for the advances, his life interest under his marriage settlement in certain stock, standing in the names of the defendants who were trustees of the settlement, and a sum charged on a landed estate, also vested in them. In the same month *John Smith*, a relation of G. R. Smith, and one of the trustees, but not the acting one, having heard that *Maberly* was embarrassed, talked with G. R. Smith on the subject, who in the course of that conversation said, that he had advanced money to *Maberly*, who had given him the above-named security. This conversation took place without any intention to give effect, validity or

confirmation to the previous assignment. Conversations on the subject of that security afterwards took place between the same parties as *Maberly's* embarrassment increased. He became bankrupt, and in April 1832 the defendants, as trustees of the settlement, having received the dividend on the stock, refused to pay it over to the plaintiff, alleging as a reason, that at the time *Maberly* became bankrupt his life interest was in his possession, order or disposition, within 6 Geo. 4. c. 16. s. 72., that his assignees were entitled to it, and consequently to the dividend. This being made one of several questions on a bill filed, the lord chief baron ordered it to be argued in this court. The Court said, that in a case like the present, which was in the nature of a special case, and came before the court on admissions, only one counsel on a side should in future be heard.

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Wigram and *G. Richards*, for the plaintiff, argued at great length, first, that the stock assigned was not in the possession, order or disposition of the bankrupt, within 6 Geo. 4. c. 16. s. 72., at the time the commission issued against him; and cited on this point the following cases: *Ryall v. Rowles* (a), *Ex parte Monro, in re Fraser* (b), *Ex parte Richardson* (c), *Ex parte Day* (d), *Lempriere v. Pasley* (e), *Greening v. Clark* (f), *Ex parte Shright, in re Eyles* (g), *Jones v. Gibbon* (h), *Wildman v. Wildman* (i), *Ridout v. Lewis* (k). They contended, secondly, that if notice to the plaintiff of the assignment in question was neces-

(a) 1 Atk. 165; 1 Ves. sen. 348. (b) Buck's Bankruptcy Cases, 300.

(c) Ibid. 480. (d) Ibid. 365. (e) 2 T. R. 485.

(f) 4 B. & Cr. 316. (g) 1 Mont. R. 502.

(h) 9 Ves. 407. (i) Ibid. 176.

(k) 1 Atk. 269, 2 id. 104; 1 Ves. 267, 2 id. 7, 190.

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sary to its validity, as against the assignees of the bankrupt, it had in fact been given.

Simpkinson and *Spence* contra for the defendants (a), cited on the first point *Ex parte Burton* (b), *Ex parte Usborne* (c), *Dearle v. Hall* (d), *Loveridge v. Cooper* (e), *Wright v. Lord Dorchester* (f), *Ex parte Wills* (g), *Hartley v. Smith* (h), *Com. Dig. tit. Biens*; and on the second *Hawkins v. Day* (i), *Edwards v. Harben* (k).

The judgment of the court turned entirely on the second point, and fully canvassed it; any further notice of the arguments therefore seems unnecessary.

Cur. adv. vult.

The judgment of the court was afterwards delivered by

LORD LYNTHURST C. B.—The question in this case was, whether the life interest of Mr. *Maberly* in the dividends of certain stock, and in the interest on a certain mortgage, which had been vested in trustees under his marriage settlement, was the property of the plaintiff under the assignment of such interest made to him by Mr. *Maberly*, or whether it passed to the assignees under the fiat issued on Mr. *Maberly*'s bankruptcy. The assignment to the plaintiff was made *bonâ fide* and for a valuable consideration, viz. to secure the repayment of a sum of money which had been lent by the plaintiff to the bankrupt.

(a) Virtually for the assignees.

(b) 1 Glyn & Jameson, 207.

(c) *Ibid.* 358.

(d) 3 Russ. R. 1.

(e) *Id.* 30.

(f) Cited 3 Russ. R. 49.

(g) 2 Cox's cases, 233.

(h) *Buck's Cases*, 316.

(i) *Ambler*, 160; 3 *Meriv.* 555 n.

(k) 2 T. R. 387.

It was contended, on the part of the assignees, that no sufficient notice of the assignment had been given to the trustees, that the property therefore remained in the order and disposition of the bankrupt at the time of the bankruptcy, and that consequently it passed to his assignees.

On the other side, it was insisted that sufficient notice had been given, and further, that the interest of *Mr. Maberly* in these dividends did not come within that provision of the bankrupt act upon which the assignees relied.

It was proved on the part of the plaintiff, and not disputed by the assignees, that notice of the assignment had been given to *Mr. J. Smith*, one of the trustees. It was said, however, that this was insufficient, first, because it was not given for the purpose of completing and giving validity to the assignment, but merely to satisfy *Mr. J. Smith* the trustee, that the plaintiff, to whom he was nearly related, was sufficiently secured for his advances made to the bankrupt. But we think the purpose for which the notice was given, if a notice were in fact given, is altogether immaterial.

If *Mr. J. Smith*, the trustee, was made acquainted by the plaintiff with the fact of the assignment, there could be no necessity for giving him a second notice. It would have been a mere form, and altogether superfluous.

It was then urged against the sufficiency of the notice, that notice to one only of the trustees was insufficient, that it should have been given to each of them, and that this not having been done the property remained in the order and disposition of the bankrupt up to the time of his bankruptcy; but we are of opinion that notice to one of the trustees was sufficient. No valid assignment could have been made by the bankrupt after the notice to *Mr. J. Smith*. A second

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assignee, in order to have obtained a priority over the plaintiff, must have shown that he had exercised proper caution in taking the assignment, and that he had applied to the trustees to know if any previous assignment had been made; and unless he applied for this purpose to each of the trustees, he would not have exercised due caution, or have done all that he ought to have done. But if he applied to each of the trustees he would have been informed by one of them, Mr. *J. Smith*, of the previous assignment to the plaintiff, and he must then have taken the property, if at all, subject to the claim of the plaintiff.

Then as no effectual assignment of the interest conveyed to the plaintiff could have been made by the bankrupt in this case, we are of opinion that the property was not in his order or disposition at the time of the bankruptcy, and that it did not pass to his assignees.

The view we have taken of this case, and the opinion we have formed upon the subject of the notice, renders it unnecessary to consider the other question, viz. whether the plaintiff's interest in this property be within the meaning of the section in the bankrupt act, upon which the argument on behalf of the defendants has been rested.

Judgment for the plaintiff.

ARDEN *against* MORNINGTON.

The venue having been changed from London to Hereford in an action of covenant on a lease for non-payment of rent for premises situate in Hereford, the court refused to bring it back.

R. *V. RICHARDS* moved to bring back the venue to London from Hereford, to which place it had been changed. The declaration consisted of one count on a covenant in a lease to pay rent for premises in Hereford.

BAYLEY B.—Does the principle of the rule for retaining the venue in actions on specialties apply, except where they are for payment of money? Suppose an action like the present to be brought by the assignee of the reversion against the assignee of the lease, the venue would necessarily be local.

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Richards took nothing by his motion (a).

(a) See *Tidd*, 9 ed. 603, &c.

JOHNSON *against* BERESFORD.

TOMLINSON showed cause against a rule obtained by *Richards*, to change the venue from *Middlesex* to *Staffordshire*, in an action against a surety for money lent to a third person. The defendant's affidavit, on which the venue had been changed, stated, that the principal debtor had assigned effects to the plaintiff, for payment of the sum for which the surety was sued, with interest, which had been sold by the plaintiff, by the produce of which, as well as by a payment by the surety, the whole principal sum due had been satisfied, with the interest. That six witnesses, all living in *Staffordshire*, would be necessary to prove this defence. But the defendant has only sworn to a good defence, not to a good defence on the merits (b).

An affidavit of a good defence on the merits is not necessary in order to changing the venue on special grounds, where the facts sworn to amount to a good defence; e. g. where it is sworn that the debt has been satisfied.

BAYLEY B.—The affidavit states, that the whole money which can be claimed by the plaintiff has been paid by the defendant. That would be a good defence to the action, and in substance amounts to the affidavit that the defendant has a good defence upon the merits, which is necessary by the rule on this subject (c).

Rule absolute.

(b) See *Westerdale v. Kemp*, ante, Vol. I. 261; *Johnson v. Popplewell*, Vol. II. 715.

(c) See *Lancaster v. South*, Vol. II. 789.

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ELLIS, Assignee of the Sheriff of York, *against* BATES
and others.

Where a bail-bond was forfeited for want of justification in due time, and an assignment of it was written for from town before bail was finally allowed, the court set aside the proceedings on the bail-bond with costs to be paid by the plaintiff, *minus* those of the assignment which had been occasioned by the defendant's default.

CROMPTON had obtained a rule to set aside all proceedings on a bail-bond by the assignee of the sheriff of *Yorkshire*, with costs. It appeared, that on 28th *October* last, the day for which the original defendant had given notice of justifying country bail at chambers, they were opposed, on the ground that they did not swear to being "worth" the requisite sum, but only that they were "possessed" of it (*a*). Time was obtained till 30 *October* in order to procure fresh affidavits, but as they did not arrive that day, fresh notice of justification for 1st *November* was then given. On 31st *October* the affidavits arrived, and the bail justified on the 1st *November*. A rule for allowance being then drawn up, was served on the plaintiff's attorney between three and four *p. m.* on the last-mentioned day; but he had written by the post of 30th *October*, directing his agent in *Yorkshire* to take an assignment of the bail-bond, which was accordingly done on 1st *November*, and on 4th *November* process was sued out against the bail on their bond.

J. Jervis showed cause, that at all events the plaintiff was entitled to the costs of the assignment of the bail-bond, which had not been offered to him, according to *Leaver v. Spraggon* (*b*).

BAYLEY B.—The assignment of a bail-bond without more is not a step in the cause; *Woosnam v. Pryce* (*c*). It is a step over which the court has no jurisdiction;

(*a*) See *Rogers v. Jones*, Vol. III. 256.

(*b*) 2 N. R. 85. See 11 Pri. 633. 2 M. & S. 526.

(*c*) *Ante*, Vol. III. 375.

but in this instance it was not taken prematurely, or before default by the defendant, Nor is it sought to set it aside. But had the plaintiff informed the defendant that it had taken place, the plaintiff might have obtained the costs of the assignment, on a summons to stay proceedings on paying those costs; instead of which process is sued out in this action, and further expenses incurred. The proceedings are clearly irregular, the writ having been sued out after service of the rule for allowance of the bail; but as the expense of the assignment was caused by the defendant's default, the rule must be absolute, with costs to be paid by the plaintiff, *minus* those of taking the assignment.

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Per Curiam.—Rule accordingly.

KENSIT *against* BULTEEL.

A Sheriff having neglected to return process returnable in vacation, a judge's order was obtained in vacation, calling on him for such return, which, though duly served, was disobeyed; *Comyn*, on the first day of the term, moved to make this order a rule of court, and also why an attachment, pursuant to *Reg. Gen. M. 3 W. 4. No. 13*, should not issue against him.

The Court held, that two rules were not made requisite by *Reg. Gen. M. 3 W. 4. No. 13*, [*ante*, Vol. III. p. 5.] and assented to the motion in the terms prayed.

One rule is sufficient to make a judge's order for returning a writ in vacation a rule of court, pursuant to *Reg. Gen. M. 3 Will. 4. No. 13.*, and also to call on a sheriff to show cause why an attachment should not issue against him for disobeying such order.

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REX *against* PRICE and WAKELING, in
LAWRENCE *against* MORGAN.

A judge's order granted in vacation must not be drawn up as of the preceding term.

A Judge having granted an order calling on attorneys to deliver a particular of sums paid them by their client, *Heaton* contended that the order, though granted in the vacation after *Trinity* term, had been properly made a rule of court as of *Trinity* term. The case having stood over,

BAYLEY B. afterwards said, all the judges were of opinion that to make the order thus granted a rule of court of the preceding term, would be to introduce an incongruity on the face of the proceedings, by making it appear that the attachment was issued on an order made long previous to its actual date : and that if such a practice had prevailed, it should exist no longer. The case was quite different from ruling a sheriff to return a writ which has been issued in the vacation, and on which an attachment may be obtained on the first day of next term. The order may be made a rule of court of this term.

REX *against* the Sheriff of MIDDLESEX, in
WOLLASTON v. WRIGHT.

Where a defendant is arrested in the vacation between 10th *August* and 24th *October*, and the sheriff, on being ruled to return the writ, returns *cepi corpus*, the defendant may put in special

bail in that vacation, by 2 *Will.* 4. c. 39. s. 11, though, before they are perfected, a judge's order be made, pursuant to *Reg. Gen. Hil.* 3 *Will.* 4. calling on the sheriff to bring in the body within four days, by putting in and perfecting special bail.

AN arrest had taken place on 13th *August* under a bailable *capias*. Bail below was put in on the 15th. On the 19th the sheriff was ruled to return the writ, and on the 22d returned *cepi corpus*. On the 22d special bail were put in. On the 24th exception was entered to them, and notice thereof given to the defendant, requiring him to justify before a judge in four days at chambers, pursuant to *Reg. Gen. Hil.* 2 *Will.* 4. No. 17.

[Vol. II. 342.] (a). On the same day, the plaintiff obtained a judge's order to the sheriff to bring in the body within four days, by putting in and perfecting special bail, pursuant to *Reg. Gen. Hil. 3 Will. 4.* [Vol. III. p. 241.] On the 27th a baron granted the defendant time till 24th *October* to justify bail. The bail were not perfected, and on 1st *November* defendant rendered in discharge of his bail. On the first day of term (2d *November*) a rule was granted for an attachment against the sheriff, and the baron's order was made a rule of court.

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Thesiger moved to set aside that attachment for irregularity, on affidavits by the sheriff's officer that he had no collusion with the defendant, and did not know it was necessary to put in and perfect bail before 24th *October*. The question is, whether the sheriff was bound by the judge's order to put in and perfect special bail as there required? The statute 2 *Will. 4. c. 39. s. 11.* enacts, that if a writ of summons, *capias*, or detainer, shall be served or executed on any day between 10th *August* and 24th *October* in any year, special bail may be put in by the defendant on bailable process, or appearance entered either by the defendant or the plaintiff on process not bailable, at the expiration of eight days from the service or execution thereof. Then as the defendant was only bound to put in special bail before 24th *October*, the attachment was irregular. But *Reg. Gen. Hil. 3 Will. 4.* [ante, Vol. III. p. 241.,] interposes a difficulty, by providing, that where a rule for returning a bailable *capias* expires in vacation, and *cepi corpus* is returned, a judge may order the sheriff, within the like number of days after the service of such order, as by the practice of the court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into court, by forthwith putting in and perfecting bail above to the action, on

(a) And see 11 *Geo. 4. and 1 Will. 4. c. 70. s. 12.*

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pain of attachment for disobedience on making the order a rule of court in the next term, whether bail be perfected or not in the meantime. A rule having been granted,

Archbold showed cause in support of the attachment. Formerly the sheriff, when ruled to bring in the body by a rule expiring in vacation, had until the first day of the next term to put in and perfect special bail; but now, by 11 *Geo. 4.* and 1 *Will. 4. c. 70. s. 12.*, bail may be justified before a judge in chambers in vacation. If the plaintiff was not precluded from obtaining a judge's order calling on the sheriff to bring in the body on a day between 12th *August* and 24th *October*, pursuant to *Reg. Gen. Hil. 3 Will. 4.*, the attachment was regular. [*Bolland B.* The interval between 12th *August* and 24th *October*, is taken out of the legal year altogether.] It is contended not as to proceedings before declaration (a); for the *capias* required special bail to be put in within the usual time, though exceeding eight days after service or execution thereof on him. All the proceedings against the sheriff are left as before the act.

Thesiger in support of the rule. The 2 *Will. 4. c. 39. s. 11.* empowers a defendant arrested or served with mesne process between 12th *August* and 24th *October* to put in bail at the expiration of eight days from the service or execution thereof, but does not compel him to perfect it before 24th *October*; and the *Reg. Gen. Hil. 3 Will. 4.* must be taken virtually to except the days taken out of the legal year by the previous enactment in the section cited. Then the defendant was rendered in time, viz., before attachment.

LORD LYNTHURST C. B.—The act for uniformity of

(a) The provision in s. 11 is, "Provided also, that no declaration or pleading after declaration shall be filed or delivered between 10th *August* and 24th *October*."

process, 2 Will. 4. c. 39., recites in s. 11., that as according to the then present practice no proceedings could in certain cases be effectually had on writs returnable within four days of the end of any term until the beginning of the next, unnecessary delay was sometimes occasioned thereby; and it then proceeds to enact for remedy thereof, that if any writ of summons, capias, or detainer, issued by authority of that act, shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may be had thereon, (*except as hereinafter provided,*) without delay, at the expiration of eight days from the service or execution of the process, whether the last of the eight days fall in term or vacation. The clause subjoined by way of proviso, enabling bail to be put in by the defendant onailable process served or executed between 10th *August* and 24th *October*, was thus rendered necessary to prevent a defendant who could find special bail from remaining in confinement all the vacation; but though such an enabling clause was so rendered necessary, it cannot be extended by construction beyond its terms. However, leaving the proviso out of the question, and supposing a party to be in custody in the vacation, there is, in my opinion, nothing to prevent him from putting in special bail (a).

BAYLEY B.—The fair meaning of sect. 11 is, that a plaintiff may proceed to judgment and execution at all times of the year, in vacation as well as term, with a proviso that between 10th *August* and 24th *October*, a defendant may put in bail, but no declaration or other pleading shall be filed or delivered. The sheriff was placed in difficulty by the new act, therefore the rule for setting aside the attachment must be absolute on payment of costs.

Rule absolute on those terms.

(a) *Seemle*, he might afterwards justify them in vacation, 11 Geo. 4. and 1 Will. 4. c. 70. s. 12.

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WATSON *against* ABBOTT.

A sheriff or other judge presiding at the trial of an issue under a writ of trial, pursuant to 3 & 4 Will. 4. c. 42. s. 17., has the same power to nonsuit that a judge at nisi prius has.

An action for unliquidated damages, *e. g.* in running down the defendant's boat, cannot be tried before the sheriff under a writ of trial.

HILL moved to set aside a nonsuit by the secondary of *London*. The question was, whether under 3 & 4 Will. 4. c. 42. s. 17., a sheriff or judge of a court of record for recovery of debts, commanded by writ of trial to preside at the trial of an issue, might nonsuit in the same manner as a judge of a superior court may do at nisi prius?

LORD LYNDBURST C. B.—A nonsuit always proceeds on the assent of the plaintiff. If the plaintiff appears to resist it he need not be nonsuited, and may insist on having the verdict of the jury. But if, on the sheriff's expressing an opinion that he ought to be nonsuited, he does not so insist or appear, the sheriff may proceed as a judge at nisi prius would do.

The *Court* having refused the rule on the above ground, granted it on another; against which, *Petersdorff* showed cause; but the rule was made absolute, when it appeared that the action was for unliquidated damages in running down the plaintiff's boat, and not for a "debt or demand," within 3 & 4 Will. 4. c. 42. s. 17. The plaintiff afterwards obtained a verdict at the *London* sittings.



HAYNES *against* FOSTER.

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DEBT for money had and received. Plea, nil debet.

At the trial at the *Guildhall* sittings after *Trinity* term 1832, before *Gurney B.*, the plaintiff had a verdict, after a trial of great length and much contradictory testimony.

Wilde Serjt., having obtained a rule for a new trial in *Michaelmas* term,

John Williams and *Crompton* showed cause, and *Wilde* and *Coleridge* Serjts., with *R. V. Richards*, supported the rule in *Easter* and *Hilary* terms 1833. As the judgment contains those facts of the case on which the decision turned, it has been considered unnecessary to state the arguments:

The judgment of the court was now delivered by

LORD LYNDEHURST C. B.—Messrs. *Wood* and *Poole* carried on the business of bill-brokers in the city of *London*. The bills in question were placed in their hands by the plaintiff in order that they might in their character of bill-brokers procure them to be discounted. Messrs. *Wood* and *Poole* had had extensive transactions in business with the defendants. They owed the defendants a balance of some amount, and in the early part of the week in which the bills in question were delivered to the defendants, Messrs. *Wood* and *Poole* had applied to them for assistance, and Messrs. *Foster* had lent them a considerable sum of money upon an undertaking that bills should be deposited in their hands to secure them for their advances. Some bills were on that occasion produced by *Wood* and *Poole*, but the defendants excepted to them, and it was arranged that in the course of the week further bills to the satisfaction of Messrs. *Foster* should be deli-

Where a bill-broker receives a bill from his customer merely to get it discounted, he has no right to mix it with bills of other customers and pledge the whole in a mass in order to secure a loan of money to himself. Still less has he a right to deposit bills received merely for the purpose of discount, as a security or part security for money previously due from him; and the pawnee receiving the bills from him with reasonable ground of suspicion, a fortiori with knowledge of the limited authority on which he held them, cannot detain them against the customer who originally deposited them with him.

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vered. Application was made to *Wood* and *Poole* by one of the partners on the *Saturday*, requiring them to fulfil their undertaking, and in the course of that day *Wood* delivered to the defendants bills to the amount of 6000*l.* and upwards, including the bills in question, and the defendants advanced them a further sum of 3000*l.* The bills on the *Monday* were re-delivered to Messrs. *Wood* and *Poole*, in order that they might take the particulars of them, and they remained in their possession during that day. They were returned in the evening to the defendants, and within a day or two afterwards Messrs. *Wood* and *Poole* stopped payment.

The question is, whether, under these circumstances, Messrs. *Foster* can retain the bills against the plaintiff; and the first point to be considered is, what was the duty of the bill-brokers in this case?

We are of opinion that, according to the general law, a bill-broker who receives a bill merely for the purpose of procuring it to be discounted for his customer, has no right to mix it with bills of his other customers, and to pledge the whole mass as a security for an advance of money; for the consequence of this would in many cases be, that the bill of one customer might be detained for a loss arising from the dishonoured bills of other customers. Still less has the bill-broker, as we think, a right to deposit bills, which are received merely for the purpose of discount, as a security or part security for money previously due from him. We are of opinion therefore, in this case, that *Wood* and *Poole* acted inconsistently with their duty to the plaintiff by depositing the bills in question with a large amount of other bills belonging to other persons, for an advance of money, and as a security in part for previous advances.

The next question is, whether this affects the claim of the defendants, Messrs. *Foster*. In general a person

who advances money on the deposit of bills, has by law a lien on them against the owner, although the party making the deposit may have had no authority to pledge them. This is clearly established; but the rule is subject, we think, to this condition, viz., that the party with whom the bills are pledged is ignorant of the limited authority of the person making the pledge, and has no reason to suspect that such authority is of a restricted character. The question therefore in the present case resolves itself into this; did Messrs. *Foster* know that these bills were received from the customers of Messrs. *Poole* and Co. merely for the purpose of discount, or had they good reason to believe it? Because if they either knew or had good cause to suspect it in the one case, they had no right to receive the bills as a security; and in the other case, they had no right to receive them without previous inquiry. And if they chose to take the bills by way of deposit without making such inquiry, they took them at their peril; and not having exercised due caution, must abide by the result.

Now what was the relative situation of these parties? Messrs. *Wood* and *Poole* had carried on business as bill-brokers in the city of *London* for a considerable time; they had, in fact, been assisted in commencing business by Messrs. *Foster*. They were in no other trade; in the course of their business they had had money and bill transactions to a considerable extent with Messrs. *Foster*. These circumstances lead us to the conclusion that Messrs. *Foster* must have had good reason at least to suspect that a portion of the bills to so large an amount as 6000*l.* must have been deposited with *Wood* and *Poole* by their customers, for the purpose of discount. They however made no inquiry, but received the bills as a security partly for a past advance, and in part for an advance

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then made. We agree with the jury that due caution was not exercised in this transaction. We think that Messrs. *Foster* took the bills at their peril, and that they cannot hold them against the plaintiff. The verdict, therefore, must stand for the plaintiff.

Rule discharged.

PRICE *against* HUXLEY.

If a *capias* does not state the residence of the defendant, pursuant to 2 *Will.* 4. c. 39. sched. No. 4., it will be set aside for irregularity, with all subsequent proceedings, notwithstanding *Reg. Gen. Mich.* 3 *Will.* 4. No. 10, (which see Vol. III. p. 4.)

THE writ of *capias* not having stated the residence of the defendant, pursuant to stat. 2 *Will.* 4. c. 39. Sched. No. 4., a rule was obtained to set aside the *capias* and subsequent proceedings for that cause.

Knowles showed cause. The object of the act was to protect the sheriff in the execution of the process, and not to benefit the defendant. The court have a discretion whether to set aside the writ or not; for by *Reg. Gen. Mich.* 3 *Will.* 4. No. 10., "if the plaintiff or his attorney shall omit to insert in or indorse on any writ, or copy thereof, any of the matters required by the act 2 *Will.* 4. c. 39. to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular on application to the court."

Lord LYNTHURST C. B.—The object of the statement of the defendant's residence in the form of *capias* provided by the act, was to identify the defendant, so that the right person might be taken. The act has provided certain forms, the adhering to which is of great consequence in order to prevent loose practice.

It is a matter of public convenience that the description of the person to be arrested should be accurate, in order to prevent any mistake.

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BAYLEY B.—The intention of the general rule which has been cited, was to protect the plaintiff against an action, for without that rule the writ would be void as being contrary to the act. It is there provided, that the writ shall not be void for the omission of any matter required to be inserted thereon, but shall be set aside for irregularity. That was the object distinctly in the contemplation of those who framed that rule.

Per Curiam.—Rule absolute.

SERLE, Executor, *against* BRADSHAW, Administrator.

ASSUMPSIT for work and labour for the intestate, and goods sold and delivered to him. The defendant being under terms to plead issuably, pleaded, first, the general issue; next, plene administravit; and lastly, his own bankruptcy and certificate. The intestate died in February 1830, and the commission issued in September. A rule having been obtained to set aside the judgment for irregularity,

Where an administrator, being under terms to plead issuably, pleads inconsistent pleas, *e. g.* plene administravit and his bankruptcy, the plaintiff may sign judgment as for want of a plea.

Comyn for the plaintiff showed cause. The judgment was regularly signed, for though the two first pleas are issuable within the order, the last is not, and the whole therefore is vitiated; *Waterfall v. Glode* (a). [Bayley B. The defendant is not charged personally,

(a) 3 T. R. 305.

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nor is a devastavit suggested, but the claim is made against the assets of the intestate. The defendant says the administrator cannot plead in bar of that action that he has become bankrupt, but the commission is only against the goods which the bankrupt has of his own, and cannot bar the plaintiff from proceeding against the assets which the defendant has as executor.] The debt due from the intestate to the plaintiff could not be proved by him under the commission against the administrator, so that the plea of bankruptcy is not an answer or an issuable plea, viz., a plea upon which the plaintiff may safely take issue and go to trial. The defendant's object in pleading it was to obtain time, by inducing the plaintiff to demur.

Archbold in support of the rule. The certificate was a bar to this action, for the debt sued for might be proved under the commission against the bankrupt administrator. [*Bayley* B. What right has the plaintiff to prove against the goods belonging to the administrator in his own right? It is against them only that the commission is directed, not against those of the intestate. Then how can the certificate bar the plaintiff from pursuing the assets which the bankrupt has as administrator?] *Re M'Williams* (a) is an authority that where an administrator admits assets, the debt may be proved under the commission against him. The modern practice is, after petitioning for an account of assets, to follow them into the court of review, and prove against the bankrupt's estate. *Cumming v. Sharland* (b) shows that the ordinary plea of the defendant's bankruptcy is an issuable plea, if pleaded to the whole declaration. [*Bayley* B. Unless the defendant in that case was an executor or adminis-

(a) 1 Sch. & Lef. 173.

(b) 1 East, 411.

trator, it does not bear on the present question.] The plaintiff says that the defendant has admitted assets. Now *Ex parte Fairchild* (a) shows that a legatee may prove for the whole amount of the legacy against the estate of a bankrupt trustee. The proper course was to discharge the rule for pleading double, if the pleas were inconsistent.

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BAYLEY B.—The regular course to charge a party *de bonis propriis* is to obtain judgment against him, and then suggest a *devastavit*. Now the third plea here assumes that the intestate's assets were mixed up with the bankrupt administrator's own goods, and that a *devastavit* has been committed, or it cannot be supported. But *plene administravit* has also been pleaded, which admits assets. These pleas are inconsistent, for it cannot be true that the defendant has fully administered, as stated in the second plea, if the third plea be true, viz., that having received the assets he has mixed them with his own, and committed a *devastavit*. That plea by an administrator is a novelty in my experience, and brings me to consider the effect of these inconsistent pleas. Unless a *devastavit* has been committed, and until it is suggested, the bankruptcy set up by the third plea cannot be tenable as a defence; for the commission would not bind any effects on which, if the plaintiff had judgment and execution in this action, the sheriff would have a right to levy under a *fieri facias*. Then the second and third pleas being inconsistent, and one of them false, the judge's order for pleading issuably has not been complied with. If the defendant could have satisfied us that he had fully administered, he might have been let in to set aside

(a) 1 Glyn & J. 231.

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the judgment, but there being no affidavit of merits in that respect, this rule must be discharged.

BOLLAND B.—One of these pleas must be untrue in order to make the other available.

Rule discharged.

PAULL against PAULL.

An attachment for non-performance of an award was resisted, on the ground that an action was pending thereon; but it appeared that the party was in contempt before it was brought, by having before then refused to pay the sum awarded. The court granted the attachment on the terms of the plaintiff's discontinuing the action and paying the costs.

In showing cause against a rule for such an attachment no objection can be taken to the award, which does

not appear on the face of it.

If the reference is of a cause and all matters in difference, the attachment will issue, although the award mis-reciting it be a reference of the cause only; for if any other matter in difference existed, of which the arbitrator had had notice, it would be a ground to move to set aside the award.

FOLLETT had obtained a rule for an attachment for non-performance of an award in favour of the plaintiff.

Smirke showed for cause, first, that after the money due on the award had been demanded, "a writ of summons at suit of the plaintiff, in an action of debt on the same award," had been sued out and served on the defendant, to which he had caused an appearance to be entered, which action was still pending. Also, that the submission to arbitration was by parol only: that the arbitrator had not given the deponent's attorney notice of one of the meetings. The court having intimated that the first was the only objection on which they had any doubt, and that the award could now only be objected to for some defect on the face of it; he contended, in support of his first point, that the party in whose favour the award was made had elected his remedy on the award by commencing an action on it; that the motion for the attachment was before discontinuance of that suit, and was at most an application

to the equitable discretion of the court, which would not be granted where the party is thereby exposed to a double proceeding. He cited *Badley v. Loveday* (a) to show that an attachment will not be granted for non-performance of an award pending an action thereon, and that the plaintiff will not be allowed to waive the action in order to apply for the attachment.

Secondly, the award is bad on the face of it; for though the submission was in fact of the cause and of all matters in difference, the award commenced with recital that "whereas this action was referred" &c., proceeding then to award on "the matters so referred." [*Bayley* B. That is merely mis-recital. If there was in fact any other matter in difference besides the cause of which the arbitrators had notice, it should have been shown to the court as a ground for setting aside the award. He may have thought that as no other fact was in evidence, he need not recite more largely in his award.]

Follett in support of the rule. The demand and refusal of the sum awarded took place on 5th *December* 1832, and the writ was sued out on 5th *April* following. Then the demand and refusal having taken place before the writ was sued out, the party was in contempt before action brought. That distinguishes this case from those cited: nor is there any reported case that under such circumstances an attachment may not stand if the action be discontinued. Nor does it appear on the affidavit that any action is in fact pending on this award. A writ has been sued out, but, until the plaintiff declared, the defendant could not know whether he is sued on this award or not. Why, on principle, shall not a party avail himself of both remedies,

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(a) 1 B. & P. 81., recognized by Lord Eldon in *Nichols v. Chalie*, 14 Ves. 268.

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if he does not pursue both at once? In an anonymous case in *Andrews's Reports*, p. 299, a rule for an attachment was granted on the plaintiff's undertaking to discontinue.

Lord LYNDHURST C. B.—That case was cited and disregarded in *Badley v. Loveday*. The best course will be to make the rule absolute on terms, for if it was discharged, the plaintiff would only discontinue his action and apply again for an attachment, which must then be granted. That method would only occasion fresh expense. The rule therefore must be absolute, on the terms of discontinuing the action and paying the costs of it.

Rule absolute accordingly on those terms, the attachment to lie in the office for a fortnight (a).

(a) In *Higgins v. Willes*, 3 M. & R. 382, *Boyley B.* said, that in order to repel an application for an attachment on this ground, it lies on the party resisting it to show that the action was pending when the award was made.

DADD *against* CREASE.

In a declaration for slander there were ten counts; the plaintiff had a verdict on the seventh for 50*l.* and for 100*l.* on the other nine. Costs were taxed to the plaintiff on every count, but the Exchequer chamber afterwards held, on error on the other nine for 100*l.* Entire costs were taxed to him on the whole. A court of error afterwards held the sixth count bad, and that a *venire de novo* should be awarded as to the nine counts. The plaintiff, however, having consented to remit his damages on the nine counts instead of a *venire de novo*, that court directed the verdict to stand on the seventh count on those terms: Held, that the master ought to disallow the plaintiff the costs taxed to him on the other nine counts.

brought, that the sixth count was bad, and directed the defendant in error should be at liberty to retain his verdict on the seventh count, and remit his damages on the rest instead of having a venire de novo. A rule having been granted calling on the master to review his taxation and disallow the costs of the other counts,

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Bompas Serjt. showed cause. The plaintiff is entitled to his costs on the nine counts though one be bad; for a remittitur of damages does not necessarily imply a remittitur of costs, or the plaintiff would not have relinquished his venire de novo. Had that writ been awarded, the defendant would have been liable to pay the costs of the first trial, and the present taxation involves him no more. In *Adams v. Meredith* (a), the judgment was reversed, which distinguishes it from this case.

Erle contra was stopped by the court.

BAYLEY B.—The principle is well established, that upon a writ of error, the party in whose favour the reversal occurs is restored to all things of which he was deprived by the decision held to be erroneous. The verdict which assessed the damages on the nine counts being applicable to them all, and the damages being entire, that verdict, if it could not be sustained on one of the counts, could not be sustained on any. The necessary consequence of that would have been a venire de novo on all the counts. The plaintiff would then have undergone a fresh risk that some of them might on the new trial have been found for the defendant. The judgment of the court of error deprived the plaintiff of his right to the entire damages

(a) 3 Y. & J. 419.

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on the nine counts, but he had still the right to a venire de novo, which he did not claim, but consented to remit his damages on those counts. The costs being parcel of or appendant to those damages, the plaintiff, when he ceased to have a right to the damages, being the principal matter, lost the right to the accessory also. Entire costs were here taxed on all the counts, without separate taxation on each. Now the damages being the foundation on which the right to the costs stands, and the right to them being superseded in toto as to the nine counts, the right to the costs on them is also superseded, so that the master ought to see what portion of the costs allowed is applicable to those counts. The terms of the bargain imply that the plaintiff shall give up the damages, and consequently every thing which is by law added to or becomes part of them.

VAUGHAN B.—The plaintiff, by agreeing to remit the damages on the nine counts, agreed to remit the costs applicable to them.

BOLLAND B.—In *Bird v. Appleton* (a), a venire de novo was awarded in consequence of a defective special verdict on the first trial. The plaintiff had a verdict on the second trial, but distinct damages not being found on each count a new trial was directed, without providing, in the rule for that purpose, for the costs of the former trials; the plaintiff again had a verdict, but was held entitled to the costs of the last trial only. In *Edwards v. Brown and Others* (b), that doctrine was adhered to.

Rule absolute.

(a) 1 East, 111.

(b) 1 Tyr. R. 281.

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REX *against* CALVERT, in a Cause of SMITH *against*
CALVERT.

A RULE was granted to show cause why an attachment for non-payment of costs, pursuant to the master's allocatur, should not be set aside, because in the copy of the rule served on the defendant his name was spelt *Calver*, not *Calvert*, and the master's *Day*, not *Dar*.

Where, in the copy of an attachment for non-payment of costs, pursuant to the master's allocatur, which was served on the defendant *Calvert*, the final *t* of his name was omitted, and that of the master was stated to be *Day* instead of *Dar*, the court set aside the attachment and discharged the defendant, though in the original rule the names were spelt right.

Miller showed cause. In — v. *Rennoll* (a), the court would not discharge a defendant for a variance in an *s* between the affidavit of debt and the writ. [*Bayley* B. The court did not say there was no variance.] The same was held in a similar case, where the final syllable was spelt *rum* instead of *run* (b). In *Shaw v. Tytherleigh* (c), the defendant being served with mesne process in the name of *John Tither Leigh*, gave notice to the plaintiff that if he proceeded in the action, he would move to set aside the proceedings for the misnomer, and tendered him the full amount on his demand. The defendant was afterwards attached, he not having appeared, and the court refused to set aside the proceedings as irregular. Here too the original rule, which was correct, was shown the defendant, who also swears that *Day* should have been *Dar*.

LORD LYNTHURST C. B.—The plaintiff was bound to serve a correct copy of the process on the defendant. Now the copy actually served was imperfect in two respects. It appears exactly the same as if the allocatur had not been signed at all, for it purports to be signed by one *Day*, not being an officer of the court

(a) 1 Chit. R. 659.

(b) Ibid. 660 n.

(c) 2 Pri. 328.

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or concerned in the allowance of costs. To allow this copy to be good service would be a premium to negligence.

BAYLEY B.—In *Shaw v. Tytherleigh* the only defect was the separation of the surname, and the objection might have been taken by pleading in abatement, in that as well as in the other cases cited. Here there is no other way to remedy these defects; besides, the attachment is for disobeying the master's allocatur. Now the copy served on the defendant does not purport to be such allocatur.

GURNEY B.—The court ought not be called on to supply the omissions occasioned by the carelessness of the attorney in preparing the copy he was to serve.

Rule absolute to set aside the attachment.

JOHNSON and Another, Assignees of COCHRANE, a
 Bankrupt, *against* MARRIOTT.

Where an attorney who, having been employed for the plaintiffs in a cause, had gone on as far as the issue and giving notice of trial, and had laid the facts of the case before counsel for his opinion, was afterwards discharged by his then clients, but not for misconduct; the court refused to restrain him from acting for the defendant in the cause, there being no affidavit by the plaintiffs or their solicitor that the attorney had, while in their employment, obtained a confidential knowledge of particular facts, which it would be prejudicial to their case to communicate to the defendant, or that the case which had been laid by him before counsel contained facts, the disclosure of which by him to the defendant would have a similar effect.

W. H. WATSON had obtained a rule for setting aside a baron's order for changing the defendant's attorney, and for restraining Mr. Jay from acting as such. From affidavits of the present attorney for the plaintiff and his clerk, it appeared that in

May 1832, Jay had been appointed attorney to the plaintiffs as assignees of *Cochrane*, and as their attorney had commenced this action in their names, to recover goods of the bankrupt which had been taken in execution. His bill of costs showed that he had delivered the issue, made two copies of the pleadings for briefs, had conferences with the bankrupt, given notice of trial and taken the opinion of counsel on all the facts of the case. Afterwards and before the trial he was discharged by the plaintiffs, who now swore to their belief that he was fully acquainted with all the circumstances of their case, and that the defendant's employing him would injure the plaintiffs.

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Bompas Serjt. showed cause on affidavits of Mr. *Jay*, that the case submitted to counsel on behalf of the plaintiffs had been drawn by their former solicitor who had handed it to him, and that he knew no more of the facts than from reading the declaration. Collusion with the defendant or soliciting to be appointed his attorney, was also denied. This case entirely differs from that of *Cholmondeley v. Clinton* (a), where it was held, that an attorney cannot of his own accord, and without more, abandon his original client and act for the other side, so as to communicate what was confided to him in his former capacity. The arguments there used for restraining Mr. *Montriou* from acting for Lord *Cholmondeley*, all rested on that ground; and Lord Chancellor *Eldon* expressly said, that he could not be considered to be in the situation of a solicitor discharged by Lord *Clinton*, and therefore that he could not be employed by the other side in the same cause. Then it follows that if a party voluntarily takes his cause from his attorney, the latter would be in the same situation as if discharged by his client, who

(a) 19 Ves. 261, 276.

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could be employed by the other side. *Grissell v. Peto* (a) is in point. In country places where few attorneys practice, if a man, after employing an attorney, discharges him and takes another, it may be very inconvenient to prevent the other side from employing the first. It is not here pretended that Mr. *Jay* was discharged for misconduct.

W. H. Watson in support of the rule. The affidavits show that the action was brought to recover the produce of a sale of the bankrupt's goods, illegally had under an execution. All the steps in the cause as far as notice of trial, and preparing briefs, were taken by *Jay*, and the case laid before counsel, if drawn by a former solicitor, is dated after *Jay's* appointment as such, so that he must have been acquainted with its facts. [*Bayley B.* The affidavits do not state that the case laid before counsel contained matter, the disclosure of which would be injurious to the plaintiffs.] The only question necessary to be decided in *Cholmondeley v. Clinton* was, whether an attorney is of himself at liberty to reject his client and withdraw from his suit. Lord *Eldon* there held, that a solicitor not discharged by his client could not become the solicitor for the other party in the same cause. Communications by the client to his attorney are protected when their connection has ended, without reference to the reason for which it has so ended. That is the privilege of the client, and he ought not to be prevented from discharging his solicitor at discretion, though not guilty of misconduct. [*Bayley B.* The affidavits of the assignees do not suggest that they had communicated any confidential matter to *Jay*, the disclosure of which would injure them.] Though Lord *Eldon*, in *Beer v. Ward* (b), refused to restrain the

(a) 9 Bing. 1.

(b) 1 Jac. R. 77.

defendant's solicitor from giving evidence of confidential communications which came to his knowledge while clerk to the plaintiffs' solicitor, that decision left the question of the plaintiffs' privilege open for the court before which the defendant's attorney might be called as a witness. In *Bricheno v. Thorp* (a), Lord *Eldon* admits that the rule in *Cholmondeley v. Clinton* is not confined to the case of a solicitor ceasing by his own act only to be employed as such, but may extend to the case of a clerk formerly in the office of an attorney opposed to his present employer, if it were shown that mischief would result from suffering him to be so employed. The facts show it to be impossible that the attorney should not have acquired a knowledge of this case.

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BAYLEY B.—It appears to me that we ought not to make this rule absolute. In *Cholmondeley v. Clinton* Mr. *Montriou*, a solicitor, who had retired from his partnership with Mr. *Seymour*, in which they had acted as solicitors for Lord *Clinton*, was restrained from acting as solicitor for Earl *Cholmondeley*, because, as by the private agreement of the two solicitors at their dissolution of partnership, to which Lord *Clinton* their client was no party, *Montriou* was to withdraw and not to act as solicitor for Lord *Clinton*, that withdrawal placed *Montriou* in the situation of a solicitor discharged by his own act, and not by that of his client. It seems to have been the opinion of Lord *Eldon*, that had he been dismissed by his client he might have been employed by the other side. From *Grissell v. Peto* it appears, that in a very strong case

(a) 1 Jac. R. 300; and see *Robinson v. Mullett*, 4 Pri. 353; *Wright v. Meyer*, 6 Ves. 280; *Parkins v. Hawkshaw*, 2 Stark. R. 240; *Harvey v. Clayton*, 2 Swanst. R. 221 n.; *Falmouth (Earl) v. Moss*, 11 Pri. 455.

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of inconvenience an attorney may be restrained from acting on the other side, where he has previously obtained information which should not be disclosed by him in his new capacity. Again, in *Bricheno v. Thorp* Lord Eldon did not think himself warranted to interfere, where it was merely stated that a solicitor for certain parties against whom, while he was a clerk, his late master had been employed, had obtained information then, which might be prejudicial to the other side; but desired to be informed in what particular it would be prejudicial. But the chief foundation of my opinion here is, that the clients, the assignees, make no affidavit. The attorney here having been in the first instance concerned for them, they know and can best tell whether they made confidential communications or not to *Jay*, which it would be material that he should not disclose to the defendant. But no such matter is sworn to by either of them or their solicitor. It has been argued that the case drawn and submitted to counsel for his opinion, must have conveyed such information to Mr. *Jay*; if that were so, the affidavits should have stated that it did contain facts necessary to be kept from the defendant's knowledge, in order to prevent injury from accruing to the plaintiffs by the disclosure. If the assignees had sworn that they had made communications to Mr. *Jay* of that essential importance, that if disclosed to the defendant, they, as plaintiffs, would be materially prejudiced in their suit, I should have hesitated to discharge this rule, and to suffer Mr. *Jay* to act for the defendant; but as no assignee or creditor states that a single material fact was communicated to *Jay*, and the application is rested solely on the affidavits of the plaintiffs' present attorney and his clerk, whose conclusions of the amount of Mr. *Jay*'s knowledge of the facts are drawn from his bill of costs,

I am of opinion that no sufficient case is established upon which the court can make this rule absolute.

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BOLLAND B.—I agree with my brother *Bayley*, and for the same reasons. We are here to decide on the rights of three parties; viz. of the defendant who seeks to employ *Mr. Jay* as his attorney, of *Mr. Jay* whose interest is concerned in that employment, and of the plaintiffs, who wish to restrain the defendant from having *Mr. Jay's* services on this particular occasion. Now the affidavits disclose no facts sufficiently strong to warrant us in exercising our power to restrain him from acting as attorney to the defendant. The only fact on which his so acting is objected to by the plaintiffs is, that he has been before employed by them in this case and afterwards discharged by them, but without any imputation of misconduct. Now in *Chalmondeley v. Clinton*, Lord *Eldon*, after consulting all the common law and equity judges, seems to have been of opinion that a solicitor discharged by his client for any reason, other than misconduct, is differently situated from a solicitor who has withdrawn voluntarily from the cause in which he had been employed, and that he was therefore clearly at liberty to employ his talents and exertions for the opposite party; though if he afterwards communicated to the latter the secrets of his former client, or in his new employment improperly used that knowledge of them with which he had been confidentially entrusted by his original client, so as to injure or prejudice him, the court might interfere to punish him for so doing. But no facts are here disclosed to warrant the interference prayed for by this rule.

GURNEY B.—I concur, but I do not say that if an attorney conducted himself so as to procure his client

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to discharge him, a court would not restrain him from acting for the opposite party, and consider his discharge to have been in truth his own act; but in the present case the plaintiffs have not shown in their affidavits that Mr. *Jay* was acquainted with any confidential communication made by them, the acting on which by Mr. *Jay* for the defendant, or the disclosure of it by him to the defendant, might prejudice them in the action.

Rule discharged.

ASHMAN *against* BOWDLER.

The plaintiff's attorney may make the affidavit that the debt is unpaid, in support of a motion to enter up judgment on an old warrant of attorney, if he has been employed in managing the principal, and in receiving and paying over the interest.

GALE had obtained a rule to enter up judgment on an old warrant of attorney, which was not drawn up, the affidavit having been made by the plaintiff's attorney. It however stated that the warrant of attorney was given for a sum which the plaintiff's attorney had been in the habit of managing, and of receiving and paying over the interest to the plaintiff, and that the money was unpaid.

Per Curiam.—That sufficiently shows why the plaintiff does not make the affidavit, and that his agent has means of knowing whether the money remains unpaid or not.

Rule granted.

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DOE d. FLOYD *against* ROE.

ADDISON moved on the consent rule for an attachment against the lessor of the plaintiff, for not paying costs pursuant to the master's allocatur. A rule for judgment as in case of a nonsuit had been made absolute by the defendant, but no subpœna solvas had been sued out against the nominal plaintiff, according to the ancient practice.

Per Curiam.—No such step can be taken with effect against the nominal plaintiff. There has been in reality a demand of the costs, though not preceded or accompanied by the subpœna solvas.

In another similar case on a subsequent day, *Doe d. Fry v. Fry and Barker*, the master stated, that in all probability the old practice arose from the attachment being founded on a subpœna which originally issued on the equity side; upon which the court said, that as ejectment was entirely on the common law side, and no such practice existed in the other courts, it could not be necessary in this.

Attachment granted.

PITT *against* Pocock and Biggs, Gent. one &c.

BOTH defendants being arrested on a joint writ of capias, gave bail to the sheriff.

Mansell for *Biggs* moved that the bail-bond might be delivered up to be cancelled, on the ground that as an attorney he was privileged from arrest. Before 2 W. 4. c. 39. an attorney who subjected himself to be sued jointly with an unprivileged person lost his privilege, and might be arrested, because the defendants at

An attorney sued jointly with a person not privileged from arrest, does not, since 2 W. 4. c. 39. s. 4. lose his own privilege by that circumstance; for he may now be served with a copy of the capias on which the

other defendant is arrested; and where an attorney so served had been arrested and gave bail, the court ordered the bail-bond to be given up to be cancelled.

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that time must be sued jointly under similar process, and a *capias* could not be sued out against one defendant, while a bill was filed against the other. But now, by sect. 4. of that act, proceedings by bill are abolished, and a mode is provided by which privileged and unprivileged persons may be sued jointly, without arresting the former, viz. by suing out a writ of *capias*, of which a copy only may be served on the attorney, while the other party may be arrested upon it. That course should have been adopted here.

Follett showed cause in the first instance. The act did not intend to take away from plaintiffs their former right to proceed against an attorney sued jointly with an unprivileged person by holding him to bail, or to compel them to proceed against him by service only, though it gave them power to do so, if they pleased. In *Ramsbottom v. Harcourt* and *Bawden* (a) the court agreed that where an attorney is sued jointly with another unprivileged person, he loses his privilege from arrest. In *Walker, Gent. v. Rushbury, Gent.* (b), the converse of this case, it was recognized by *Wood* and *Garrow* Bs. that where an attorney has a right to sue another by *capias* of privilege (e.g. an attorney of another court), he may hold him to bail as one of the incidents to that right. The proviso in sect. 4. takes away no right of arrest that existed before.

Per Curiam.—This is a question on which, as it concerns proceedings in all the courts, we will consult the other judges. On another day,

Lord LYNDHURST C. B. said, We have spoken to the judges of the other courts upon this question; they

(a) 4 M. & S. 585.

(b) 9 Pri. 16; *Bowyer v. Hoskins*, 1 Y. & J. 199. See also *Elkins and Another v. Harding, Gent.*, ante, Vol. I. 274; *Arden v. Tucker*, 4 B. & Adol. 815.

are all of opinion, that the attorney in this case does not lose his privilege by the circumstance of being sued with an unprivileged person, as means are now afforded to plaintiffs by 2 W. 4. c. 39. s. 4. by which, without arresting him, both defendants may be brought into court.

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Rule absolute.

WALTER *against* CUBLEY.

ASSUMPSIT by payee against acceptor on two bills of exchange. Plea, non-assumpsit. At the trial at the *London* sittings after last *Trinity* term before Lord *Lyndhurst* C. B. it was proved that the bills in question had been originally accepted by the defendant, payable at his own residence in *Chelsea*, but that about six weeks after the plaintiff became the holder, the plaintiff's clerk requested the defendant to alter the acceptance by making them payable at a banker's. The defendant answered he had no banker, but, notwithstanding, altered the acceptances by making the bills payable at *J. Bland's, Great Surrey Street, Blackfriars*. The plaintiff had a verdict, which

A bill having been originally accepted, payable at the acceptor's own house, *King's Road, Chelsea*, was afterwards altered by him at the instance of the payee, and was made payable at *Mr. Bland's, Great Surrey Street, Blackfriars*: Held, in an action by payee against acceptor, that the alteration was immaterial and did not vitiate the bill.

Erle now moved to set aside, and (by leave of the lord chief baron) to enter a nonsuit. The alteration of the acceptances was such a material alteration as rendered the bill void for want of a fresh stamp. *Marson v. Petit* (a) was an action against an acceptor by an indorsee. There, after the bill had been accepted by the defendant, *Prescott & Co.* was added under his name, without his knowledge or assent, by the drawer, because the plaintiff had refused to take the bill without the addition of those words; and Lord *Ellenborough* held, that the acceptor was still liable,

(a) 1 Camp. 81.

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as the addition of the words in question did not alter his responsibility; adding, that if they had, they would have vitiated the bill. In *Tidmarsh v. Grover* (a) the drawer of a bill accepted payable at *B. & Co's.*, after keeping it three or four years, erased the name of *B. & Co.* and inserted *E. & Co.* instead, without the knowledge or consent of the acceptor, *B. & Co.* having failed since the acceptance. He then indorsed it over to the plaintiff, and it was held that he could not recover against the acceptor, the alteration being held material on several grounds; among others, that it held out a false colour to the holder, and superadded an order, or at least an authority, to *E. & Co.* to pay the bill, the consequence of which might be, that on payment by them the acceptor might have become liable to an action at their suit, and on non-payment the holder might have protested it for non-payment at a place where the acceptor had never made it payable. [*Bayley* B. In that case a place of payment unwarranted by the acceptor was substituted. Now the altering the original place of payment by substituting a new place of payment without authority, and for the purposes of fraud, was held forgery, in *Rex v. Treble* (b), where the alteration was made under similar circumstances as in *Tidmarsh v. Grover.*] The situation of the holder is here altered, for while the acceptance remained general, the presentment must have been to the acceptor; whereas after the alteration it is usual to make a demand at the place named on the bill (c). *Cowie v. Halsall* (d) is in point. There an alteration of a general acceptance by the drawer, without privity or consent of the acceptor, by adding the words "payable at Mr. *B's, Chiswell Street,*" was held material, *Bayley*


(a) 1 M. & Sel. 735.

(b) 2 Taunt. 328; Bayl. on Bills, 4 ed. 453.

(c) Even since stat. 1 & 2 Geo. 4. c. 78; *Macintosh v. Haydon*, R. & M. 362. See *Rowe v. Young*, 2 Brod. & B. 165.

(d) 4 B. & Ald. 197.

J. saying, that on dishonour at that place, the holder might give notice of dishonour and immediately arrest the acceptor, and the bill was held to be void as between indorsee and acceptor. [*Bayley* B. The adding on a bill a mere memorandum of the place where it is to be paid, has been held not to make a fresh stamp necessary, *Trapp v. Spearman* (a).] In *Macintosh v. Haydon* (b), after 1 & 2 G. 4. c. 78. had passed, the drawer of a bill of exchange accepted generally added to the acceptance, without the acceptor's knowledge, "payable at R. & Co. bankers, London," and then indorsed it for valuable consideration, the bill being over due, and the indorser privy to the alteration; and *Abbott* C. J. held, that the alteration so made was material, notwithstanding the statute, assigning the same reason in substance as had been given by *Bayley* J. in *Cowie v. Halsall*.

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LORD LYNTHURST C. B.—In this case the alteration is made by the acceptor, and I do not think that it at all alters the contract, but merely indicates another place where the holder might apply for payment.

BAYLEY B.—The alteration did not qualify the acceptances, but merely amounted to a direction by the acceptor, or to express his intention that the bills might be presented at Mr. *Bland's*. Had the acceptor removed there from *Chelsea* while the bills were running, he might have said, you may now present to me at Mr. *Bland's*. In the cases cited the alteration was made without the acceptor's knowledge or consent; whereas here the reverse is the case, so that it was an innocent act, and a mere memorandum that for the purpose of these bills the acceptor's residence was at Mr. *Bland's*.

The other barons concurring, Rule refused.

(a) 3 Esp. N. P. C. 57.

(b) Ry. & M. 362.

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SIBLEY *against* TOMLINS.

A declaration for slander stated by way of inducement, that plaintiff was a pork-butcher, and then charged the defendant with publishing to plaintiff, in presence of other persons, these words of and concerning the plaintiff:—"You are a bloody thief—who stole *F.'s* pigs? You did, you bloody thief, and I can prove it. You poisoned them with mustard and brimstone;"—inuendo, that plaintiff was guilty of pig-stealing. The jury found that the words were not intended to impute felony, but were spoken of plaintiff in relation to his trade.—Held, that the plaintiff was not entitled to recover, as the words used did not show that they were necessarily spoken of him in relation to his trade, and no colloquium concerning his trade was laid in the declaration.

CASE for slander. The declaration contained eight counts, and stated by way of inducement to six, that the plaintiff carried on the trades and businesses of a retailer of beer, a pork butcher, and a dealer in coals; while in the two others the inducement confined the statement of the plaintiff's trade to that of retailer of coal. The first count stated that the defendant, intending to cause it to be suspected and believed by the plaintiff's neighbours that the plaintiff had been and was guilty of theft, and of the offences and misconduct hereinafter mentioned, and to deprive him of the gains and profits of his said trades, in a certain discourse which the said defendant had with the said plaintiff of and concerning the said plaintiff, in the presence and hearing of divers persons, falsely and maliciously spoke and published, of and concerning the plaintiff, these words. "You (thereby meaning the plaintiff) are a bloody thief. Who stole *Fraser's* pigs? You (meaning the said plaintiff) did, you bloody thief, and I can prove it;—you poisoned them with mustard and brimstone," (thereby meaning that the plaintiff was guilty of pig-stealing). Special damage was laid, but plaintiff failed to prove it. Plea: general issue, not guilty. At the trial before *Gurney* B. at the sittings after last term, the inducement and words laid in the 7th count were proved, and the learned baron left it to the jury, first, whether the words were used; and, secondly, whether they were used in a sense intended to impute felony by theft. The jury found, that they were spoken in reference to the plaintiff's trade, but not in a felonious sense. Verdict for the plaintiff for 40*s.*

Erle moved, by leave of the learned judge, to enter a verdict for the defendant or a nonsuit, on the ground that no count in the declaration charged the defendant with having spoken the words of and concerning the plaintiff in his trade as a pork-butcher, or with intending to injure him in it, and that they had been found to be merely used as words of vulgar abuse. A rule having been granted,

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*Thesiger* and *Dundas* showed cause. Notwithstanding the rule laid down by Serjt. *Williams*, in *2 Saund.* 307 a. note (1), is, that words which are not actionable in themselves, but only so because spoken of a man in his trade, must be alleged in the declaration to have been spoken of him in relation to such his trade, or the declaration contains no cause of action, and judgment will be arrested, the cases of *Bell v. Thatcher* (a), *Smith v. Ward* (b), *Stanton v. Smith* (c), and *Carn v. Osgood* (d), show that words found to have been spoken, and to have necessarily related to the plaintiff's trade, office, or employment, are actionable, without colloquium laid of such trade &c. If found by a jury to have such relation, they are considered to be imported into the declaration.

BAYLEY B.—The rule alluded to on behalf of the plaintiff is, that if the words used have a natural tendency to show that a man ought not to carry on the trade he does, they are actionable. For instance, had the defendant said to the plaintiff, "You poisoned *Fraser's* pigs, and sold them," or "You sell tainted meat," that would have clearly charged him with an improper act in his trade as a pork-butcher; but how is it in itself actionable to say of a man in his trade, "You poisoned *Fraser's* pigs with mustard and brim-

(a) Freeman's R. 277; Vin. Ab. tit. Action for Words (T a) pl. 22.

(b) Cro. Jac. 674.

(c) Lord Ray. 1480.

(d) 1 Lev. 280.

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stone"? Such words have not that necessary connection with the plaintiff's trade calculated to prejudice him in it, which will justify a court in saying, that, without any allegation that they were spoken of the plaintiff in his trade, they are in themselves actionable. The cases are very distinct where money, or knowledge, or character are necessary to carrying on a trade or employment, and a want of either is clearly imputed by the words themselves which are used; *e. g.* to say of a trader or attorney, he is insolvent, or has committed a highway robbery; of a physician, he is an ass; or of a justice of peace, he is forsworn and not fit to sit on a bench; and other like instances.

Rule absolute for entering a nonsuit.

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WHITEHEAD, suing with DORNING and Others, Assignees of GREENWOOD, a Bankrupt, *against* HUGHES and Another.

A solvent partner may sue out a writ in the name of his copartner, or, if bankrupt, in the names of his assignees, as well as his own, in order to recover a debt due to the partnership.

A Rule had been obtained to set aside the writ and proceedings in this case. *Roger Whitehead* and the bankrupt *Greenwood* had been partners in trade. After the bankruptcy of the latter, *Whitehead*, as solvent partner, sued out a writ in his own name and that of the assignees of *Greenwood*, to recover from the defendants a debt due to the firm.

*Crompton* showed for cause, that *Whitehead* remaining liable for debts due from the firm was justified in using the names of the assignees in suing for debts due to it.

*W. H. Watson* in support of the rule. It is sworn that the assignees of *Greenwood*, having applied for payment of this money on the joint account, gave

indemnity to the defendants for paying the same to them, and it was accordingly paid them; since which time *Whitehead* has applied for payment.

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**LORD LYNTHURST C. B.**—A solvent partner remaining liable for the debts of the firm, has a right to sue in the names of his copartner or of his assignees, if he is bankrupt; though the latter may apply to stay proceedings till he gives them security for costs, or may go into equity to prevent him from receiving the proceeds.

Rule discharged with costs (a).

(a) See 10 East, 418; *ibid.* 130; 1 Camp. 279. A solvent partner is entitled to retain the partnership books when the other becomes bankrupt. *Ex parte Finch*, 1 Deacon & Chitty's R. 274.

### PREEDY *against* MACFARLANE.

**ISSUE** was joined as of *Trinity* term, and notice of trial given for the first sittings in this term. The plaintiff countermanded his notice of trial. *Price* moved for judgment as in case of nonsuit, but per

Where issue is joined in *Trinity* term and notice of trial given for the first sittings in *Michaelmas* term, which notice is afterwards countermanded,

**BAYLEY B.**—The application is premature.

judgment as in case of a nonsuit cannot be moved for in *Michaelmas* term (a).

(a) In *Marshall v. Foster*, moved on a previous day under similar circumstances, except that the notice of trial, which was countermanded, had been given for the second sittings in *Michaelmas* term. *Petersdorff* in support of the motion, distinguished *Isaacs v. Goodman*, *ante*, Vol. III. 559; and see *Reg. Gen. Easter*, 5 Geo. 4., Vol. I. Appendix, p. xii., by pointing out, that issue was there joined in the same term in which notice was given, which he contended was a step in the cause; whereas in the case before the court the plaintiff had taken no step during the term.

The Court thought the motion premature, but desired it to be renewed, if warranted by the practice of the other courts.

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MEGGINSON *against* HARPER.

**W. B.**, by will dated in 1812, bequeathed a legacy of 250*l.* to each of his daughters *Ann* and *Jane* on their attaining twenty-one, and having appointed two persons executors of his will, and three others trustees, with all necessary powers to fulfil it, died soon after. In *April* 1823, the trustees became possessed of the sum of 500*l.* retained by them from the surviving executor, as money arising from the estate of *W. B.* to be set apart for the payment of the above legacies, being the only sum remaining in their hands to pay the same. They then advanced this sum to the executor, and the defendant (as his surety) on the security of a joint and several promissory note signed by them, and payable with interest to "the trustees acting under the will of *W. B.* or their order, upon demand." The legacies not being yet payable, it was next agreed verbally, that while the legatees lived with the executor, no interest should be payable on the note. In *August* 1828, the executor paid *Ann*, who had previously attained 21, her legacy of 250*l.* with interest for such time as she had ceased to live with him. The surviving trustee of *W. B.* sued the defendant on the note in 1832.—Held, that he was entitled to recover thereon for the legacy payable to *Jane*, who had come of age in the interim, the part payment by the executor to *Ann* having taken the case out of the statutes of limitations, 21 *Jac.* 1. c. 16., and 9 *Geo.* 4. c. 14.

**A**SSUMPSIT on a promissory note for 500*l.* Plea, general issue. At the trial at the summer assizes for *Yorkshire* in 1832, the defendant consented to a verdict for the plaintiff, subject to the award of a gentleman at the bar, to whom all matters in difference, legal or equitable, between the parties were referred by order of nisi prius, power being given him, if he should think fit, to raise any point of law in the action on the face of his award. The arbitrator in his award, after reciting, inter alia, that one *Robert Brigham* became a party to the reference pursuant to the order of nisi prius, stated that *William Brigham* of *Huggate Lodge*, in the county of *York*, farmer, by his last will and testament in writing, bearing date 9th *December* 1812, bequeathed to his daughters *Ann* and *Jane* the sum of 250*l.* each, and to his daughter *Rebecca* the sum of 300*l.* to be paid them when they arrived at the ages of 21 respectively, till which periods the expense of board, clothes, and education were to be paid by his executor and executrix. He appointed his wife *Jane Brigham*, and his son *Robert Brigham*, joint executor and executrix of his will, giving them all his personalty, subject to and charged with the above legacies; and lastly, he appointed *Robert Brigham* of *Acton*, *William Megginson* the plaintiff, and *Thomas*

*Wilberfoss*, trustees, with all the necessary powers to fulfil that his last will. Testator died without revoking his will, which was proved by his wife only on 27th *July* 1813. All his trustees, including the plaintiff, acted in his affairs after his death, and one of them, *Robert Brigham* of *Acton*, by his last will, dated 6th *May* 1814, bequeathed his personalty to the above-named *Thomas Wilberfoss*, and to *R. L.* and *J. B.*, their executors and administrators, upon the trusts therein mentioned, and appointed them joint executors in trust of his will. *Robert Brigham* died 3d *April* 1815, and his will was proved in *June* 1815 by all his executors. By an indenture, dated 23d *December* 1817, between the master, brethren, and sisters of Archbishop *Holgate's* hospital in *Yorkshire*, of the one part, and the executors of *Robert Brigham* on behalf of *Jane Brigham*, widow, and *Robert Brigham* a minor, the widow and son, and also the executors of the said *William Brigham* deceased, of the other part, in consideration of 690*l.* fine paid by the said *T. W.*, *R. L.*, and *J. B.*, executors of *Robert Brigham*, for a new income or entry into the hereditaments after mentioned, the said master, brethren and sisters demised to the said *T. W.*, *R. L.* and *J. B.*, their executors &c. the said messuage called *Huggate Lodge*, with the lands and appurtenances in the indenture described, to hold to them, their executors &c. in trust nevertheless and to and for the use and benefit of *Jane* and *Robert Brigham*, their executors &c. for 21 years, from 1 *January* 1817, at the yearly rent of 176*l.* 12*s.* 6*d.* subject to certain covenants. That *Jane Brigham* died 6 *December* 1818, and that *Robert Brigham* junior, her son, occupied the demised premises till 27 *November* 1822, when *Thomas Wilberfoss*, in consideration of 511*l.* 8*s.* to be paid by him, became the occupier thereof for his own benefit. That at a meet-

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ing on 11 *April* 1823, between *Thomas Wilberfoss, R. L. and J. B.*, his co-executors of the deceased *Robert Brigham*, of *Octon*, *W. Harper* (the defendant), and *Robert Brigham* the son of the first testator *William Brigham*, for settling the affairs of the latter, providing for payment of such of his legacies as were then unpaid, and for settling the account between the said *Robert Brigham* and *T. Wilberfoss*, the said sum of 690*l.* paid by way of fine, and that of 511*l.* 8*s.* to be paid by *T. Wilberfoss*, were brought into account, and 11*l.* 8*s.* was paid to *Robert Brigham* as his own, whilst the remaining 500*l.* was retained by *T. Wilberfoss* as money arising from the estate of the late *W. Brigham* to be set apart to pay the two legacies of 250*l.* each to *Ann* and *Jane Brigham*, being the only sum remaining wherewith to satisfy the same. Application was thereupon made by *Robert Brigham*, and by the defendant on his behalf, for the loan of the said 500*l.* till the legacies should become payable, and *T. Wilberfoss* thereupon agreed to lend it on condition of receiving the following promissory note. "500*l.* *Huggate Lodge, April* 11, 1823. We jointly and severally promise to pay to the trustees acting under the will of the late Mr. *William Brigham* of *Huggate Lodge*, or their order, upon demand, the sum of 500*l.* for value received, together with lawful interest from this day." *Robert Brigham* and the defendant (his surety) having signed the note, *T. Wilberfoss* paid 500*l.* to the defendant, who afterwards paid it to *Robert Brigham*. It was also verbally agreed that while *Ann* and *Jane Brigham* should continue to reside with and be maintained by *Robert Brigham*, such residence and maintenance should be taken in lieu of payment of interest on the money secured by the note. *T. Wilberfoss* occupied *Huggate Lodge* farm and the above demised premises till his death in 1830, leaving the plaintiff *Megginson* the only surviving trustee of the

will of the said late *W. Brigham*, him surviving. *Ann Brigham* resided with *Robert Brigham* till her marriage on 18 *April* 1827, and attained her age of 21 on the 30 *May* in that year. On the 26 *August* 1828, and on several subsequent days to the 6 *May* 1830, sums amounting in all to 275*l.* 6*s.* were paid by *Robert Brigham* to her husband on account of the legacy of 250*l.* and interest thereon from the time of her marriage. That of *Jane* was not so paid, and this action was, therefore, brought on this note by the present plaintiff against the defendant, to compel payment thereof (as being part of the sum of 500*l.* for which the note was given) with interest from 2 *December* 1830, the day she, being of age, married and ceased to reside with *Robert Brigham*, but not till after the expiration of six years from the date of the said promissory note. The plaintiff was not indebted to the estate of the late *W. Brigham* or to the said *Robert Brigham*.

The arbitrator having stated these facts, awarded, that if the court in which the action was brought should be of opinion and adjudge on the facts and matters so found and stated by him upon his award, that the plaintiff *Megginson* was a proper and sufficient party to maintain the said action against the defendant, and that there was and appeared a sufficient consideration for the said promissory note to enable the said plaintiff to maintain the said action against the said defendant, and that the said action is not barred by the statute of limitations, so pleaded by the said defendant to the said action, then the verdict already entered for the plaintiff was to stand, but the damages to be reduced to 279*l.* 14*s.* with interest at five per cent. till final judgment signed; but if the court should be of a contrary opinion, then that a nonsuit should be entered.

*Starkie* was to have argued for the plaintiff, but the court called on

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*Tomlinson* for the defendant. Even supposing that there is sufficient consideration for this promise to the trustees so as to support the note (a), the action is not maintainable by this plaintiff, without the joinder of *Robert Brigham* as co-plaintiff, he being the only executor of *William Brigham* who survived at the time the note was made. As such he was bound to maintain the testator's daughters till their legacies were payable on their respectively attaining 21. Neither of them in fact reached that age till after the date of the note. Then he not being a trustee of *William Brigham's* will, was, as executor, entitled to possession of the fund out of which the legacies were to be paid, in order to maintain them, in part at least, with the interest. No action then lies on the note, for the party necessary to be made a co-plaintiff is one of the makers of the note sued on. [Lord *Lyndhurst* C. B. There being three trustees and two executors of *William Brigham*, the question is, whether the executors, after performing his will, would not have been justified in handing over this money to the trustees, they having the usual powers as such? In that view their possession of the money during the respective minorities, would not be inconsistent with their characters as trustees, and if they parted with that possession to the defendant on the security of this note, why should not this action lie by the survivor of them to recover it back?]

2dly, There is no acknowledgment in writing or sufficient part payment of principal or interest to take this case out of the statute of limitations, 21 *Jac.* 1. c. 16., as required by 9 *Geo.* 4. c. 14. s. 1. The contract for support of the daughters in lieu of paying interest on the loan, is a substituted contract, and the supporting them accordingly is not equivalent to pay-

(a) See *Ridout v. Bristow*, ante, Vol. I. 87; Chitty on Bills, 8th ed. 80.

ment, within the meaning of that act. Nor was the payment by *Robert Brigham* of the legacy and interest a payment on account of the note to the legal payees of it, so as to deprive this defendant of the protection of the statute, for *Robert Brigham* was bound to maintain her. Besides, he being jointly liable on the note with the defendant, an acknowledgment by him would not deprive the latter of the benefit of the stat. 9 Geo. 4. c. 14. s. 1. Parol evidence of the substituted contract ought not to have been received to vary the defendant's liability expressed upon the note. Had the note been indorsed the holder would have been entitled to sue for the whole, notwithstanding that part payment had been made *alieno jure*. [Lord *Lyndhurst* C. B. That might have raised a question on the note which would have put the holder on inquiring into the circumstances.] In *Willis v. Newham* (a), a verbal acknowledgment of having made payments of part of a debt within six years, was held not sufficient within 9 Geo. 4. c. 14. to take the case out of the statute. [*Bayley* B. In that case there was nothing to take the case out of the statute, but the mere verbal acknowledgment of payment.] The construction of the statute has been so strict, that the performance of a subsequent contract for payment verbally substituted for the original one, has been held not to take the case out of it, *Kennett v. Milbank* (b), *Dickinson v. Hatfield* (c). In *Price v. Edmunds* (d), *Parke* J. asked whether a contract between the maker and payee of a note can be shown by extrinsic evidence to be different from that which it purports to be on the face of the note itself.

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(a) 3 Y. & J. 516; see *Smith v. Forty*, 4 C. & P. 127, *semb. cont.*

(b) 8 Bing. 38.

(c) 2 Moody & M. 141.

(d) 10 B. & Cr. 581; see *Ridout v. Bristow*, ante, Vol. I. 87.

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Lord LYNTHURST C. B.—The promise in the note is to pay 500*l.* to certain persons described as “the trustees acting under the will of the late *William Brigham*, or their order, on demand.” The question is, whether or not a payment to one of the legatees of a sum to which she was entitled under that will, within six years after the date of the note, is a part payment to the trustees as payees of the note? They having all the usual powers of trustees, it seems to me that parol evidence was admissible to show that the payment actually made was made by their permission, or by, or conformably to their authority, viz. in performance of one of the objects of their trust. That being so, the payment in question will take the case out of the statute.

BAYLEY B.—It is a well-known general rule, that extrinsic evidence is admissible to explain a written instrument, though not to vary or contradict it. The very terms of the note make it necessary to explain by such evidence what the trusts of *William Brigham*’s will were, for the payees are described as trustees acting under it. Then does the parol evidence here admitted vary the note? It has only explained that *Ann* and *Jane Brigham* were the legatees under the will, for whom the payees as trustees held the fund. It was conformable to their duty as trustees to get possession of the fund bequeathed, in order to fulfil the purposes of their trust. When they afterwards lent it on a note payable to the trustees of *William Brigham*’s will, and the plaintiff, the survivor of them, sued upon it, after six years had elapsed from the date, it was open to him to show to what trust the payment made within that period by *Robert Brigham* to the legatee *Ann* was applicable.

As to the stipulation for maintenance of the legatees in

lieu of paying interest on the note, no question arises on that between these parties. If the payees were satisfied that the makers were likely to be insolvent, they might have demanded the whole money and sued on the note (a).

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The other barons concurred. Verdict to be entered for the plaintiff according to the award.

(a) See authorities collected, 2 Stark. on Evid. 2d ed. 478.

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**C**ASE for the obstruction of a way. The fifth count stated, that whereas the plaintiff now is and for 30 years last past had been rector of the rectory of the parish church of *Penmaen* in the county of *Glamorgan*, and as such rector, during all the time aforesaid, was and still is lawfully possessed of and entitled to all the tithes of corn, grain, and hay, yearly growing, renewing, and proceeding upon and from a certain farm and lands in the possession of the said defendant, situate in the parish aforesaid, &c.; and that plaintiff, as such rector as aforesaid, by reason of such his possession of the said tithes during all the time aforesaid, ought to have had and used, and still of right ought to have and use a certain way from a certain common and public king's highway in the parish aforesaid, unto and through a certain gate heretofore standing and being upon the said farm and lands of the said defendant, unto and into a certain close of the said defendant called *New Close*, parcel of the said farm and lands, and so back again from the said close, to and through the said gate, into, over, and along the said common and

Unless a tithe owner has a right of way to carry tithe off titheable lands within his parish, by grant of the owner of the fee or by prescription, he has *prima facie* only a right to use such road for that purpose as is used at the time by the occupier to carry off the other nine-tenths; and if he has any further right to use any other way from the particular close, because used by the occupier for other agricultural purposes, or for more convenient

use of the close, though not for the purpose of carrying off the crop, that right can only exist while such way continues, without being stopped up by the occupier.

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waste land, unto and into the said common and public king's highway, to go, return, pass and repass with his servants, horses, waggons, and carriages, for the purpose of gathering and carrying from and off the said close the tithes of corn, grain, and hay, yearly growing and renewing upon the aforesaid close, to wit, at &c. : And that also before the committing of the obstruction and grievance hereinafter next mentioned, the tithe of corn, to wit, barley growing and renewing upon the said close, and then and there being of certain great value &c., had been duly set out and severed from the residue thereof in and upon the said close, for the purpose of being carted and carried away from and off the said close, to wit, at &c. : Yet defendant, well knowing the premises, but contriving &c. to deprive him of the use, benefit, easement, and advantage of his said way and the value of his said tithes, whilst he the said plaintiff was so possessed of the said tithes as aforesaid, and whilst the said defendant was so possessed of the said farm and lands, wrongfully and injuriously removed the said gate heretofore standing and being in and upon the said way as aforesaid, and wrongfully &c., erected, built, and set up a certain wall in, upon, and across the said way, in the place and stead of the said gate so removed by the said defendant as aforesaid, and hath kept and continued the said wall so by him erected as aforesaid, in, upon, and across the said way for a long space of time hitherto, to wit, at &c. : By reason whereof he the said plaintiff, during all the time aforesaid, hath been hindered and prevented from using the said way for the purpose of collecting, fetching, and carrying away from and off the said close as aforesaid, the tithes of the said corn during all that time growing and renewing upon the said close, and during all the time aforesaid hath been deprived of all the advantage which he might and would other-

wise have derived from his said tithes, in the whole amounting to &c., and is by means of the said several grievances in divers other respects much aggrieved. Plea, general issue.

At the trial before *Patteson J.*, at the *Lent* assizes for *Glamorganshire*, it appeared that the plaintiff had been rector of *Penmaen* in that county since 1804, and was as such entitled to the tithes arising on *Reddenhill* farm, in the defendant's occupation, of which *New Close* was part. The church, parsonage, and premises were south of a road, which running nearly due east and west divided them from *Park* and *Reddenhill* farms, both occupied by the defendant to the north. The houses belonging to these farms were considerably to the north. Previous to 1817, when the defendant began to occupy both those farms together, there had for some years existed an opening from this road on its north side into *New Close*, which having been at first a gap in the fence, had been afterwards used by the occupiers to turn cattle into the field, and for other purposes, and had finally a gate or bar placed across it to divide the field from the road. The tithes of *New Close* had on three occasions been brought through it by the owner into the road, and the person who occupied *Reddenhill* farm before the defendant, took his furniture there that way, it being the only practicable road to that place for carts while it was held separately from *Park* farm. The distance from this opening to the parsonage premises was 1320 yards. A composition for tithes, which had existed between plaintiff and defendant since 1817, ceased at *Christmas* 1830, and before it terminated, the defendant took away the bar or gate and built a wall across the opening. The shortest way which then remained to carry tithe in kind from *New Close* to the parsonage, was, for a short distance, that used by the defendant to carry

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his crops home, and was in all 3520 yards long, great part of it leading to the north directly away from the plaintiff's premises to the defendant's homesteads, and from thence circuitously back to the parsonage. Another road sometimes used by the defendant to carry home his crops, was longer and more precipitous. These ways were offered by the defendant to the plaintiff to carry home his tithes, and for the interruption of the old opening the action was brought.

For the plaintiff it was contended, that where, as in this case, the road used by the occupier to carry off his crop was circuitous for the tithe owner, the latter was entitled to this old outlet to carry his tithes from *New Close*, as had been previously done. For the defendant was cited *Cobb v. Selby* (a), to show that a farmer might alter or stop up any way used by him in the occupation of his farm, though it had been also used by the tithe owner to carry off his tithe. The learned judge doubted the application of that case, as the matter claimed was not a right of way over any road, but of exit only; and having told the jury that there was no evidence of a right of way by prescription, directed them that the general law was clear that the parson might take away his tithe by the same road by which the occupier himself used to carry off the rest of the crop, but that this was a claim, not of such a road, but of mere outlet, which he thought on the whole that the defendant might be entitled to close up; and left it to them whether the obstruction was made *bonâ fide* by the defendant for the more convenient occupation of his farm, or with an intention to harass and annoy the plaintiff in collecting his tithes. The jury, in answer to a question by the judge, found that there had been for some years an opening at the spot in question, and that the defendant did not close it with

(a) 2 New R. 470; 6 Esp. N. P. C. 102, S. C. Macdonald C. B.

a vexatious intention to annoy the plaintiff (a). The learned judge then gave leave to the plaintiff to move to enter a verdict for nominal damages, if this court should hold his direction to be wrong in point of law.

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*J. Evans* moved accordingly in last *Easter* term. *Bayley* B. asked whether there was any authority to show that a tithe owner's right to the use of a road on a farm always continues the same, without varying according to the circumstances of the occupation; and observed, that the opening in question could scarcely have been made for the occupier of *Reddenhill* farm to carry his crop home that way. A rule having been granted,

*E. Vaughan Williams, Follett and Nicholl* showed cause. A tithe owner cannot, except by prescription, insist on any way for carrying off his tithe from any close except that ordinarily used by the occupier for taking away his own crops from it, and which may be varied by the latter from time to time. [*Bayley* B. May not the tithe owner carry off his tithe by any way in common use by the tenant for the ordinary occupation of the close in which the tithe is taken (b)?] It is another question whether an occupation way once used by a tenant, should ever after remain a way by which a tithe owner might carry off tithe. The convenience of the tithe owner cannot be the test, for that is matter of mere accident; for example, the tithe barn for hay may be at a great distance from that for corn, or if tithes are leased, a road very convenient to the incumbent may be the reverse to the lessee. *Degge*, (p. 358, new ed.) cited in 3d *Burn's Ecclesiastical Law*, 525, 8th ed. says, "The parson may carry his tithes from

(a) See per Sir *J. Nicholl*, 2 Phill. R. 399.

(b) See per *Chambre J.*, *Cobb v. Selby*, 2 New R. 470.

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the ground where they grew either by the common way, (viz., the king's highway (a),) or by such way as the owner of the land uses to carry away his nine parts, but if there are more ways than one, and the question is which is the right way, this is cognizable in the temporal court (b)." In *Bosworth v. Limbrick* (c), lands formerly in one occupation were afterwards occupied by two persons, and the question was, whether the right to use what was the road before the separation necessarily continued after it? *Eyre B.* in delivering the judgment of the court said, "The parson must undoubtedly have a right of way to carry off his tithes from the place on which they arise, and the occupier must open a passage for him, or he subtracts his tithes. Ordinarily the parson is understood to have a right to use the same road which the occupier uses. If the occupier has a right, the parson has also. It is accident whether this way is more or less convenient, nearer or further; its being the nearest cannot alone give the parson a right to pass over another man's land. There having been a communication when all the lands were in one occupation, which the parson might then have been entitled to use, because the occupier used it, is no argument in support of a claim to use it when the occupation becomes several. The several occupiers may have no right to use it, therefore the parson can derive no such right from them." If each occupier's right of road was there varied by the proprietor's splitting the land from the possession of one into that of several, it would by parity of reasoning be varied by the joining the *Park* and *Redden-hill* farms in one hand, as in this case. In *Cobb v.*

(a) Roll. Abr. tit. Chemin.

(b) See *Halsey v. Halsey*, Sir W. Jones, 230.

(c) 3 Gwill. 1109, by bill in exchequer; see also Anon. 1 Bulst. 108, stated 3 Gwill. 1572; and *Berney v. Chambers*, id. 673.

*Selby* (a), C. B. *Macdonald* held, that the parson might carry off his tithe by any private road on a farm which then continued to be used by the occupier for agricultural and other purposes. But this opinion was overruled on motion for a new trial, and the court of Common Pleas held the tithe owner's right of way to be confined to that which the farmer used in taking his nine parts from the particular close to the homestead. In order to get from that place to the public road, he must use whatever occupation way the farmer uses to convey his produce thither when in another shape, as after thrashing it, &c. It was admitted by C. B. *Macdonald* that the owner of the occupation road might shut it up by planting trees or any other such means. In *Burnell v. Jenkins* (b) a gate and gateway from a field into a public road had existed for many years, the tenant filled up the gateway with a wall, and determined to carry the hay through an adjoining field, of which he gave notice to the rector, who insisted on the old way; the tithe having rotted, the question arose, whether the rector was illegally "stopped and let" in carrying it away. There was no evidence that the gateway was stopped vexatiously, while it appeared that there was another road equally good and nearer by which the tithe might have been carried; and Sir *John Nicholl* decided against the rector, though he appeared to think that the farmer could not stop a way convenient to the parson, if so done with a vexatious intention. *Cobb v. Selby* was not there cited.

*Evans* and *Whitcombe* contra. The learned judge reserved the point as a strict question of law, which he did not think decided by *Cobb v. Selby*, as the matter claimed was not so much a way as an outlet to the

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(a) 6 Esp. N. P. C. 103.

(b) 2 Phill. R. 391. Arches court of Canterbury.

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high road. *Cobb v. Selby* occurred in 1807; *Burnell v. Jenkins* in 1816. Sir *John Nicholl* there says, after alluding to the peculiar circumstances of the case in favour of the occupier, "but it must not be understood by this that the farmer may stop a way convenient to the parson, if he open another which is convenient to himself, but which may be very inconvenient to the parson, especially if it be done with a vexatious intention; such a proceeding may amount to an absolute obstruction, and to a fraudulent denial of tithe. I by no means lay down that the farmer may at his pleasure stop up a gap, and subject the clergyman to unreasonable inconvenience. This is not a case of that sort." The rule which appears to have been laid down in C. P. in *Cobb v. Selby*, viz., that the only road by which the tithe owner may carry tithe from a close, is that used by the occupier to carry off the nine-tenths, seems to narrow the rights of the farmer to an inconvenient degree. That road may be varied by the occupier to suit his own convenience, and inflict hardship on the tithe owner by its circuitous route, nor can it always suffice for his acknowledged rights. It may only lead to the homestead of the occupier; so that on arriving there the tithe owner may be obliged finally to carry off his tithe by another private road not used by the farmer in the ordinary occupation of the particular close. In answer to a question from the bench, they answered that there was no evidence that the farmer had ever used the outlet in question for carrying home his crops from *New Close*, although he might have used it for carrying them to *Park Mill* or *Swansea*, lying east.

Lord LYNTHURST C. B.—There was no evidence to support any right of way in the rector by prescription or grant through the gateway in question, or to show that

it was ever used for carrying the nine-tenths produced on *New Close* home to *Reddenhill* farm, which indeed lay in a directly opposite direction. It is only proved that in about three instances the occupier suffered the plaintiff to use the outlet for taking away his tithes. Now if a tithe owner has a right to carry away his tithe by the same way along which the rest of the crop is carried off by the occupier, it is not contended that the latter might not make at least a small deviation. If he may, the tithe owner could have no right to use the old way, and could only use the substituted road used by the farmer. But taking it that the opening in question was used by him not to carry off the nine tenths, but for the more convenient enjoyment of the close, and that it had been also used by the tithe owner to take off his tithe in two or three instances, there is nothing in these circumstances to prevent the occupier from stopping up this exit, and setting out in lieu of it another way for the more convenient occupation and cultivation of his farm. Such a way has been in this instance set out and offered to the plaintiff by which to carry off his tithe. This action therefore cannot be maintained.

**BAYLEY B.**—This action is founded on the alleged right of the tithe owner to a right of way for carrying off his tithe from *New Close*: he may use for that purpose at least such ways as the occupier uses to carry off his nine-tenths from that close, so that if the occupier has a right of way for that purpose, the tithe owner's right would be co-extensive with it. His original right would be to follow the road by which the nine-tenths are carried to the farmer's homestead, and thence proceed to his own premises by any road which he could. But he may have further rights, and it is here suggested not only that he may have a right to go by the

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road used for the nine-tenths, but also to any road used by the occupier on any part of the land on which those nine-tenths grow. I will not say he has not such a right, but at the utmost it will be only co-extensive with the occupation of that way by the farmer, without depriving him of the right to discontinue it or turn it to other purposes. A right of way to carry off tithe might be granted to the tithe owner by the owner of the fee, or might exist by prescription. Such a grant would bind the owner of the inheritance and the occupier; but in the absence of either, I am of opinion that a tithe owner has no right to continue to use or occupy a way which, though used at some former period by the farmer for the ordinary purposes of cultivating a close or carrying the crop off it, has been since disused and stopped by him. Here there is no ground to presume any such right in point of fact. The road adjoined *New Close*, and a gap having been made in the fence, the occupier drove cattle through it into the field. It was afterwards used by him for purposes of his own and for the occupation of the close. In two or three instances it has been also used by the tithe owner to carry off his tithe, and if it was then one of the roads or outlets used for the occupation of the lands in question, he might have a right to use it for that purpose at that time. The learned judge would not have reserved any point of fact for us, whether there was a way by prescription or not; but left it to be argued before the Court, whether or not in point of law we ought to infer that the use of this way by the tithe owner in the manner proved gave him a right to insist that from time to time it should be left open by the occupier. My opinion is, that no such inference can be drawn from the facts in evidence.

BOLLAND B. concurred.

GURNEY B.—It does not appear that the learned judge was required by the counsel to leave to the jury any question of right of way or outlet by prescription or grant; and that matter appears to have been shut out from their consideration by the mode in which it was left to them.

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Rule discharged.

### REID *against* Lord TENTERDEN.

**C**OVENANT by reversioner against the defendant as assignee of a term in certain premises and fixtures demised to *J. A.*, his executors, administrators, and assigns, for thirty-one years, by indenture, dated 16 June 1815, at 170*l.* yearly rent. Breaches, first, non-payment of a year's rent; secondly, not repairing the premises according to the covenants in the lease. The first plea, after stating that the defendant ought not to be charged as assignee under the indenture, and also

In covenant against an executor, sued as an assignee for breaches of covenants to pay rent and to repair, incurred in his time, it was pleaded, 1st, that the defendant was executor of the lessee;

that the premises vested in him as such executor only, and not otherwise; that the profits of the demised premises at the time he became executor, and since that hitherto, were less than the rent reserved; and that the defendant had paid to the plaintiff before commencing the suit 255*l.*, being all that remained in his hands of the said profits by him at any time received therefrom, and that he had never since received any such profit. Held on special demurrer to be insufficient, for not stating that the defendant had no other assets of the deceased which had come to his hands as executor to be administered.

In two other pleas, the defendant added to the above statement, that the sum of 255*l.* so paid before the commencement of the suit was all the money which remained in his hands, not only on account of the profits of the premises received by him, but of all the goods and chattels which were of the deceased which had come to his hands to be administered; and that he had not at the time of the commencement of the suit, or at any time since, any profits or goods and chattels of the deceased in his hands to be administered. Held, on special demurrer, to be insufficient, for not stating that during the interval between the payment of the 255*l.* and the commencement of the suit, defendant had no assets.

*Semble*, an offer by an executor to a lessor to surrender to him a lease granted to his testator, is an answer to an action of covenant against him as assignee for breaches of a covenant to repair, as to all breaches accruing after that offer.

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that *J. A.* in his lifetime was only possessed of or interested in the premises by virtue of the lease, and that being so possessed, he made his will and appointed the defendant executor, and afterwards and during the term, before any part of the rent in the first breach became due, and before the committing the supposed breach of covenant in the second breach, to wit, on 28 *April* 1828, died possessed thereof and without altering his will; and that defendant proved the same, and as executor became possessed of the demised premises for the residue of the term; proceeded to allege, that the estate, right, title, interest, term of years to come and unexpired, property, profit, claim, and demand of the said *J. A.* the said lessee and testator of, in, and to the said demised premises with the appurtenances, came to and vested in him, the defendant, only as executor of the last will and testament of the said *J. A.* the said lessee, and that he never was nor is he possessed of or interested in, nor did he ever enter into or become possessed of or interested in the said demised premises with the appurtenances, or any part thereof, by assignment to him made, as in the said declaration mentioned or otherwise therein, save as executor as aforesaid. And further, that the profits of the said demised premises with the appurtenances, before and at the time of the death of the said *J. A.*, and before and at the time he the defendant so became and was executor as aforesaid, were and from thence hitherto have been and still are much less than the rent reserved and made payable by the said indenture.\* And further, that ever since the defendant became and was possessed of the said premises with the appurtenances as executor as aforesaid, he has paid to the plaintiff, for and towards the payment and satisfaction of the rent thereof, all the profits of the said premises with the appurtenances, and that before the com-

mencement of this suit, to wit, on 10 *November* 1831, paid to the plaintiff, for and towards and in discharge of the rent of the said premises with the appurtenances reserved by the said indenture, then due, the sum of 255*l.*, being all the money that there was or remained in his hands of the profits of the said premises with the appurtenances by him at any time or times received or derived therefrom, and that he has not at any time since hitherto derived or received any profit therefrom, and that he has not nor had he at the time of the commencement of this suit, or at any time since hitherto, any profits of or derived or to be derived from the said premises with the appurtenances, in his hands applicable to the discharge of the said rent in the declaration mentioned, or any part thereof, or to the discharging or making satisfaction for the damage sustained by the plaintiff by reason of the supposed breach of covenant lastly above assigned, whereof the plaintiff before the commencement of this suit, to wit, on 1 *October* 1832, had notice. Verification.

Second plea, same as first to the \*; and that the said premises for a long time, to wit, the space of twelve months next before the commencement of this suit, have been and were and from thence hitherto have been and still are wholly unproductive, and have yielded no profit whatever: And the defendant further says, that ever since he became and was possessed of the said premises with the appurtenances, he has paid to the plaintiff, for and towards the payment and discharge of the rent due to the plaintiff for and in respect of the said premises with the appurtenances, all the profits received or derived by him from the said premises with the appurtenances, and that he defendant, before the commencement of this suit, to wit, on 10 *November* 1831, paid to the plaintiff a large sum of money, to wit, the sum of 255*l.*, being all the money which there

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was and remained in his hands, not only for and on account of the profits of the said premises with the appurtenances by him at any time or times received or derived therefrom, but of, for, and on account of all the goods and chattels which were of the said *J. A.*, deceased, at the time of his death, which had ever come to or been in his hands as executor as aforesaid to be administered, and that he has not nor had he at the time of the commencement of this suit, or at any time since hitherto, any profits of or from the said demised premises with the appurtenances, or any goods or chattels which were of the said *J. A.*, the deceased, at the time of his death, in his hands as executor as aforesaid, to be administered or otherwise. Verification.

Third plea, like second, adding, that the said demised premises with the appurtenances, before and at the time of the commencement of this suit, were not likely to yield, nor is there any probability that they will yield, any profit whatsoever for and during the rest, residue, and remainder to come and unexpired of the said term, and that he the defendant is not likely to have or receive, nor is there any probability that he will have or receive any goods or chattels which were of the said *J. A.*, the deceased, at the time of his death, nor is there any probability that any goods or chattels which were of the said *J. A.*, the deceased, at the time of his death, will ever hereafter come to the hands of him the defendant as executor as aforesaid, to be administered: And he further says, that he, before the commencement of this suit, to wit, on *3 February 1831*, gave notice to the plaintiff of all and singular the premises in this plea mentioned, and offered to surrender and yield up to him the said indenture of lease and the said premises with the appurtenances, but that the plaintiff then and there refused and ever

since has refused and still refuses, to accept or receive the same. Verification.

Demurrer to first plea, alleging for causes that the said plea is pleaded to the whole declaration, wherein two breaches are assigned, but that the matter thereof cannot be applied by way of answer to the second breach above assigned, and contains no answer whatever to that breach; and also for that the said first plea contains no denial of the allegation, that the defendant entered upon the demised premises, and was possessed thereof during the time mentioned in the declaration, but, on the contrary, admits the same, and does not allege that the defendant, during the time he was so possessed, used due care and diligence in attempting to obtain profits from the said demised premises with the appurtenances, towards the payment of the rent reserved by the said indenture, nor that he could not and might not have made a larger sum towards payment of the same than the sum alleged to have been paid by him to the said plaintiff, but, on the contrary, it appears by the declaration, and is not denied by the said plea, that during the time when the defendant was possessed of the premises he suffered and permitted the same to be and the same were ruinous, prostrate, fallen down, and in great decay, contrary to the said indenture, whereby the same would necessarily become unproductive by default of defendant himself: And also, for that it is not alleged in the said first plea that the said defendant had no assets of the said *J. A.*, the said lessee, to satisfy the rents reserved by the said indenture, or to make satisfaction for the damages sustained by the plaintiff by reason of the breach of covenant lastly above assigned, nor that he ever made any offer to surrender the said indenture or to yield up possession of the said demised premises with the appurtenances to the said plaintiff, either

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before or after the committing of the breaches of covenant in the said declaration mentioned.

The causes of demurrer to the second plea resembled the first, omitting the objection to the first, that no allegation was made that defendant had no assets of *J. A.* the lessee, to satisfy the rents reserved by the indenture.

The causes of demurrer to the third plea were similar to those assigned to the second, omitting as there omitted, and adding as follows: And also for that the offer alleged in the said third plea to have been made by the defendant to render and yield up the said indenture of lease and the premises with the appurtenances, is not alleged to have been made before the committing of the breaches of covenant above assigned, or within a reasonable time after the said defendant entered and was possessed thereof, but only before the commencement of this suit. Joinder in demurrer.

*Talfourd* for the plaintiff supported the demurrer. The substantial question on the whole record is, whether an executor having entered on premises demised to the testator, and sued on a covenant to repair for breaches committed in his own time, can discharge himself by pleading that he has had no beneficial occupation? *Rubery v. Stevens* (a) would have been in point for the defendant, had the pleas been pleaded to the first breach only, without extending them to that for not repairing. That case recognizes the position laid down in *Tilney v. Norris* (b), notwithstanding the earlier cases to the contrary, among which seems to be *The Dean and Chapter of Bristol v.*

(a) 4 Bar. & Adol. 241.

(b) *Ld. Raym.* 553; 1 *Salk.* 309; *Carth.* 519, *S. C.* and cases collected 1 *Saund.* 1 a. and 111, *notis.*

*Guyse* (a), viz. that an executor who enters may be well charged as assignee in respect of his perception of the profits. Can an executor after entry, and thus entitling the lessor to treat him as assignee, shift or divide his liability with that to which he was subject as executor? [*Bayley* B. He may be charged in pleading as assignee, but with respect to rent he may by pleading confine his liability to such assets as he may have.] The earlier cases which are cited in *The Dean and Chapter of Bristol v. Guyse*, to show an executor not to be liable de bonis propriis, even for breach of covenants in a lease in his own time, will be found to turn on his being sued on the record as executor, so that the judgment could not be de bonis propriis, but de bonis testatoris only; *Castilion v. Executor of Smith* (b), *Bull v. Wheeler* (c), *Bridgman v. Lightfoot* (d). From the two latter, it appears, that except in case of pleading falsely a plea of ne unques executor, an executor so sued is only liable de bonis testatoris, even for a breach of covenant in his own time, being then only chargeable in respect of the deed and covenant of the testator. So in *Collins v. Thorogood* (e) the defendant was sued as executor. It is there however said, that an executor being bound by the testator's covenant as representing him, must be sued by that name. That seems, however, to be no longer law, and he may be charged as assignee or executor, at election of the lessor, *Boulton v. Canon* (f), *Buckley v. Pirk* (g), *Tilney v. Norris* (h), *Rubery v. Stevens* (i). The true principle on which the older

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(a) 1 Saund. 111.

(b) Hobart, 283.

(c) Cro. Jac. 647.

(d) Ibid, 671.

(e) Hobart, 188; see also 20 Hen. 6. 5. Fitz. Abr. tit. *Brief*, 111 and 940; Brooke's Abr. tit. *Noune* 60, cited to same effect in 1 Saund. 112.

(f) 1 Freeman's R. 357.

(g) 1 Salk. 317.

(h) Ld. Raym. 553, &amp;c.

(i) 4 B. &amp; Adol. 241.

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cases proceeded will be found in *Tilney v. Norris*, which was an action of covenant against an administrator, for breach of a covenant to repair committed in his own time. There *Peere Williams* for the plaintiff admitted all the cases to be law, where in covenant against executors for breaches in their own time, the judgments were given de bonis testatoris, because in them they were named and charged as such, whereas in that case the defendant was charged as assignee, and as such was sought to be charged de bonis propriis; and the plaintiff finally had judgment. [Lord *Lyndhurst* C. B. It is there also argued for the plaintiff that an administrator would suffer no hardship because he might waive the term, and so discharge himself, but he could not waive the term only without renouncing the representation *in toto* (a). *Bayley* B. An executor may promptly offer to surrender the term before a breach of covenant accrues (b). But there is no allegation in the first plea, that there are no assets. Again, the allegation in the second and third pleas is, not that the defendant had no assets when the first breach occurred, but that he had none at the commencement of the suit, or at the time of pleading. The covenant to repair is a continuing covenant, of which a breach may at any time occur.] The hardship on

(a) See *Boulton v. Canham*, Executor of *Snow*, Pollexfen, 125 n.; S. C. nom. *Bolton v. Cannon*, 1 Vent. 271; nom. *Boulton v. Canon*, 1 Freeman, 337; *Billinghurst v. Spearman*, 1 Salk. 297, and cases collected 1 *Williams* on Executors, 428.

It was also argued in *Tilney v. Norris*, that the administrator might assign over the term and discharge himself; but the testator's privity of contract remains notwithstanding his death; and an executor, if sued as such by election of the plaintiff after he has entered, seems still liable for breach of covenant to the extent of all the assets he may have in an action on the detinet, or in covenant; 1 Saund. 241 and 241 b. 112 n., *Boulton v. Canon*, 1 Freeman, 338; *House v. Webster*, Yelv. 105; *Holier v. Caschert*, 1 Lev. 127.

(b) See *Bolton v. Cannon*, 1 Ventris, 271.

the lessor is equal to that on the executor, if the former may at the end of the term be driven to sue the executor as such after he has entered, without having any assets of the testator. But the executor's liability as assignee de bonis propriis, rests on his entry or taking the profits; for taking the term under a will by operation of law, he is not otherwise liable as assignee. Nor is *Bosanquet v. Williams* (a) a contrary authority, for there the mortgagee, who was held liable to pay rent though he had never entered, took under an assignment in fact, viz. by deed. An executor need not by entry expose himself to be sued otherwise than as such. If the defendant was sued as executor, he would as such be liable to the covenant to repair, though the term were assigned to another. Thus in *Wilson v. Wigg* (b), the first count rests on the contract of the testator, not on privity of estate. [He was here stopped by the court.]

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*Follett* for the defendant had leave to amend. The point set down on the demurrer book to be argued for the defendant was, that the defendant was not liable to the plaintiff for more than the value of his interest in the demised premises.

Lord LYNTHURST C. B. Consistently with the second and third pleas, there was an interval between the 10 *November* 1831, when the defendant paid the plaintiff 255*l.*, being all the money then in his hands on account not only of the profits of the premises, but of the goods and chattels of the deceased which had ever come to his hands as executor to be administered, and the commencement of this suit. During this period no continual defect of assets is

(a) 1 Brod. & B. 238.

(b) 10 East, 312.

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stated to have existed, and the defendant might have had a large sum of money, assets of the deceased. Nor is the want of assets sufficiently expressed in either of the pleas.

**BAYLEY B.**—If the premises were out of repair at the testator's death, it became the executor's duty to apply his general assets to perform that repair as well as to pay any rent then due. It need not be here said that he was bound to do so in preference to other claims, for no demand appears to have been outstanding at the time of the testator's death, or any defect of assets. The pleas do not aver that the executor did all he could to make the remainder of the term profitable. The first plea makes no allegation whatever that the defendant had no assets of *J. A.* to satisfy the rent reserved, or make satisfaction for breach of the covenant to repair. Now, as the rent was payable quarterly, it might happen that the amount of the first quarter's rent might either exceed that of the assets in hand, or be much inferior to them. The offer to surrender the lease, if promptly made and pleaded according to the fact, will help the defendant as to all the breaches laid, particularly as far as respects the want of repair accruing after it was made, though it may not cover any preceding default in that respect (*a*).

Leave to amend given.

(*a*) It is said in *Wentw. Off. Ex. c. 11. p. 244., c. 12. p. 290*, 14th ed. that if the profits of the land are of less amount than the rent, and there is a deficiency of assets, an executor may waive the lease. And see *Wilkinson v. Caswood*, 3 *Anst.* 909, by *Macdonald B.* cited 2 *Williams on Executors*, 1079. *Ante*, p. 118, note (*a*).

WALKER and Others *against* BOURNE.

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**HUMPHREY** had obtained a rule to show cause why, on payment of costs, all proceedings on the bail-bond assigned in this cause should not be stayed, the defendant having since put in and justified special bail. Capias issued 17 *December* 1832, and the arrest took place about the end of *October* 1833. Bail not being put in in due time, the bail-bond was assigned on 8 *November*, and a writ issued against one of the bail, after which, on 11 *November*, the defendant put in bail, and justified on the 13th.

When a trial has not been lost, the court will stay proceedings on a bail-bond, if the defendant has since put in and perfected bail, on his taking short notice of trial, but without affidavit of merits, or that the application is made at the instance of the defendant, the sheriff, or the bail.

*Wightman* showed cause. It does not appear whether the rule was obtained on the application of defendant, his bail, or the sheriff. Nor is there any affidavit of merits.

Lord LYNTHURST C. B.—That in the King's Bench is a sufficient answer to an application like the present, by express rule of that court, *Michaelmas* 59 *Geo.* 3. (a). The master certifies that there is no such rule here, and it does not appear that a trial has been lost.

Rule absolute on the defendant's taking short notice of trial (b).

(a) See 2 Barn. & Ald. 240.

(b) S. P. 11 Pri. 633. 636, and *scmb.* without payment of costs, though in 13 Pri. 114, M'Clell. 44. S. C. the rule was moved on payment of costs. Nor will the bail-bond stand as a security, but the plaintiff will be put in the same situation as if bail had justified in due time; id. and 3 Pri. 52. See Tidd, 9th ed. 302.

GARLAND v. CARLISLE, Assignee. See Vol. III. 705.

TRAPPES v. HARTER and Another, Assignees. See id. 603.

WILKINS v. WRIGHT, Esq. See id. 824.

THE END OF MICHAELMAS TERM.

**REPORTS OF CASES**  
**ARGUED AND DETERMINED IN THE**  
**COURTS OF EXCHEQUER OF PLEAS**  
**AND**  
**EXCHEQUER CHAMBER,**  
**IN**  
**Hilary Term,**  
**IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.**

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**ELSTON and Others, Assignees of ELSTON, a Bankrupt, against ELIZA BRADDICK.**

A person who had been discharged under an insolvent act in 1815 became bankrupt in 1829 (3 G. 4.) and obtained his certificate, but paid less than 15s. in the pound. He afterwards became possessed of property. Held, that his assignees under the commission were entitled to recover under sect. 127 of 6 G. 4.

c. 16, which has for that purpose a retrospective effect, notwithstanding the interest previously vested in the assignee under the insolvent act.

**D**EBT for money had and received, to recover a balance belonging to the bankrupt, and placed by him in the *Bank of England*. At the trial before *Gurney B.* at the *London* sittings, the facts appeared to be as follows:—In 1815 the bankrupt *Elston* was discharged under the insolvent act then in force, and in 1829 became bankrupt, the plaintiffs being his assignees, and obtained his certificate. His estate paid a dividend of 1s. 6d. in the pound. In 1831 he married, prior to which his wife's property, which consisted of stock in the funds, was vested in trustees for her sole use, except a part which was sold out and lent to the husband to trade with, for which he was to account with the trustee of the settlement. The balance

of these proceeds of stock thus sold out, having been placed in the *Bank of England* by the husband, this action was brought by the assignees under his commission against that body, but by a rule of court the trustee was substituted as a defendant. At the trial it was contended for the plaintiff, that as the bankrupt's estate had not paid 15s. in the pound, his subsequently acquired effects were vested in his assignees by stat. 6 G. 4. c. 16, s. 127., which enacted, that if any person discharged by any insolvent act should become bankrupt and obtain his certificate, such certificate should only protect his person from arrest, but not his future estate. For the plaintiff it was contended, that as the bankrupt had taken the benefit of the insolvent act before 6 G. 4. c. 16. passed, he did not come within the provisions of that act. The learned baron reserved the point. For the defendant it was then submitted, that as the money sued for was the property of the trustee for the use of the wife, it was not liable for the debts of the husband. The learned baron told the jury, that as the defendant had permitted the bankrupt to use his wife's property, her only remedy was by action against him. Verdict for the plaintiff for the balance claimed.

A rule to enter a nonsuit having been obtained by *Follett*, who cited *Carew v. Edwards* (a),

The *Recorder* (C. Law) and R. V. *Richards* showed cause. The defendants contended that the operation of 6 G. 4. c. 16. s. 127. is prospective only, so that a discharge under the insolvent act 52 G. 3. c. 165. and 53 G. 3. c. 6. being prior to 6 G. 4. c. 16. cannot be connected with a bankruptcy subsequent to that act, so as to be within its provision. The word "such" in s. 127. followed by "certificate as aforesaid" refers to the effect of the certificate so

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obtained, not to the time when it was obtained, whether before or after 6 G. 4. c. 16., as appears from the rest of the clause which applies to those acts of the bankrupt which precede, as well as to those that follow the passing of the act, and to certificates obtained before or after that time. *Churchill v. Crease* (a) affixes a retrospective meaning to similar words in s. 82. In *Robertson v. Score* (b) the inclination of Lord *Tenterden's* opinion was, that sect. 127 of 6 G. 4. c. 16. applied to cases where the first certificate was granted under a commission issued before the passing that act. In *Fowler v. Coster* (c) this point appears to have been taken for granted to be as here contended for the plaintiff. Nor does *Carew v. Edwards* (d) impeach the present construction; for there the discharge under the insolvent act, and the certificate under the commission; both took place previous to 6 G. 4. c. 16. and the law as applicable to that state of things is not altered, as respects the effect of the certificate. But the certificate obtained under 6 G. 4. c. 16. has a different effect from one obtained before that act; for sect. 127 contemplates the existence of certain matters which operate on a certificate after 6 G. 4. c. 127.; and the words by which the "vesting in the assignees" of the future effects of the bankrupt is there compassed are quite new; being a consequence of the circumstances which exist when a certificate which is obtained under 6 G. 4. c. 16. attaches. Section 135 provides for a construction of the act most beneficial to creditors, and saves commissions subsisting at the times of passing the act and of its taking effect. Then a commission granted after this act attaches on the state of things which existed before it. [*Bayley* B. If it did not, a person certificated un-

(a) 5 Bing. 180.

(b) 3 Bar. &amp; Adol. 358, 342.

(c) 10 B. &amp; Cr. 427.

(d) 4 Bar. &amp; Adol. 351.

der any previous bankrupt act, but arrested after 6 G. 4. c. 16. might find a difficulty in procuring his discharge under sect. 126.] Then the word "certificate" in sect. 127. comprehends certificates obtained under that and every other act under which they have been had. A certificate allowed, but not issued before 6 G. 4. c. 16. must without doubt comply with that act.

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*Follett* contra. At the passing of 6 G. 4. c. 16. the creditors of *Elston*, when he was discharged as an insolvent in 1815, were interested in and entitled to take his future property; then the question is, whether sect. 127 has expressed the meaning of the legislature to be to deprive them of that right, by vesting his property in another set of creditors. Section 127 is altogether prospective. If the assignees claim under that section, all the incidents mentioned in it must concur, and must have happened since the act passed, in order to vest the property in them. Under the old bankrupt as well as insolvent laws, each individual creditor might have sued the bankrupt (*a*). [*Bayley* B. The new bankrupt act, by vesting the bankrupt's property in the assignees as trustees to sue, only varies the mode in which it is to be liable to the creditors.] The words of sect. 127. "any person who *shall have been* discharged by such certificate as aforesaid," are said to have a general retrospective meaning, but they apply only to the time of obtaining the certificate. Nor is an act retrospective without specific words. [*Bayley* B. The act is prospective in applying to future certificates, but a previous discharge under a previous act is not inconsistent with its provisions.] The act applies to the property of the bankrupt, in which not only he, but his creditors, are interested; but if that

(a) 5 G. 2. c. 30. s. 9.; 52 G. 3. c. 165. s. 54.

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property is affected by previous insolvency, no property would exist on which the assignment under the bankrupt act could operate.] The previous creditors' interest in, and right to take it, would remain unaffected by the circumstance, whether the commission be void or not. Though judgment has been entered up, still if they do not take possession, the property is that of the bankrupt. The words "so discharged" and "such certificate" in sect. 127. refer to sect. 121., and mean a discharge not merely out of custody, as in sect. 127., but also from debts due by him when he became bankrupt, and from all demands made provable under the commission. This question hardly arose in *Robinson v. Score*, and in *Carew v. Edwards* a new trial was ordered on this point, but the case has since been settled. In *Maggs v. Hunt* (a) the court of Common Pleas thought that an act of bankruptcy committed after the repeal of the former acts by 6 G. 4. c. 16., but before its general provisions came into operation, would not support a commission issued after that event, and the court of K. B. in *Hewson v. Heard* (b), *Palmer v. Moore* (c), and *Surtees v. Ellison* (d), acted upon that decision. In *Surtees v. Ellison* a commission had issued in a similar manner on a trading, which took place before 6 G. 4. came into operation, and was held void. In *Kaye v. Cooke* (e) the words in sect. 92. "shall have given notice," were held entirely prospective. Those are as strongly retrospective in grammatical meaning as the present, but do not apply to the time of passing the act, but to the time when the claim was about to be applied. *Kaye v. Goodwin* (f), which arose on sect. 95. shows that 6 G. 4. c. 16. does not apply to the inrolment of proceedings before that act. In *Bell v. Bilton* (g) the sections 54

(a) 4 Bing. 212.

(b) 9 B. &amp; Cr. 754, n.

(c) Ibid.

(d) 9 B. &amp; Cr. 750.

(e) 2 Moore &amp; P. 720.

(f) 6 Bing. 576.

(g) 4 Bing. 615.

and 55, which were held retrospective, were plainly so expressed. *Churchill v. Crease*(a) shows that payments bonâ fide made by a bankrupt after an act of bankruptcy, and before 6 G. 4. c. 16. came into operation or the commission issued, are protected, unless the party had notice; but the terms of sect. 82 were not there in question.

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*Cur. adv. vult.*

BAYLEY B. delivered the judgment of the court. This was an action of debt by assignees of a bankrupt for money had and received by the defendant to the use of the bankrupt, and the question turned on the meaning of 6 G. 4. c. 16. s. 127. The facts were very short. In August 1815 the bankrupt was discharged under the insolvent debtors' act then in force. In July 1829 a commission of bankrupt issued against him, under which his estate paid in 1830 a dividend of less than fifteen shillings in the pound, and he obtained his certificate. In 1831 he married a lady possessed of real and personal property, great part of which was vested in the defendant as her trustee for her sole use. As to the residue, the wife, previous to her marriage, executed a power of attorney to sell and transfer, in order to enable the husband to trade with it; and he was to account for it yearly with the defendant as trustee. The stock, however, remained in the wife's maiden name, and after the marriage the husband sold it out, and placed the proceeds to his account with the *Bank of England*. This action was brought to recover the balance of that account. The defendant, as trustee of the wife, was substituted by rule of court for the *Bank of England*, against whom it had been first brought.

The question is, whether the words in the early part

(a) 5 Bing. 177.

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of 6 G. 4. c. 16. s. 127. are confined to discharges by bankruptcy or insolvency occurring after the passing of that act? or, whether they also comprise discharges happening before that period? It is, therefore, material to consider what the law was before that act passed; and we must see what was the language of the former acts relating to bankrupts, and what the language of the clause in question is. The language of sect. 127. is, "That if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce, after all charges, sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest or imprisonment, but his future estate and effects, except his tools of trade and necessary household furniture and the wearing apparel of himself, his wife and children, shall *vest* in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission." If there has been such previous discharge as the act contemplates, it does not protect them from the claim of the assignees, but vests the property in them. 5 G. 2. c. 30. s. 9. was the only act in force before 6 G. 4. c. 16.; and that act provided for the discharge of the person of the bankrupt only, but enacted that his future effects should be liable; and there was a provision in the insolvent act applicable to future effects, by which the assignees might *seize in execution* the future effects of the party. Until 6 G. 4. c. 16., therefore, bankrupt's goods were liable to the claim of each separate creditor, and to that also of

his assignees under the insolvent act, and between them there might be competition as to who should first seize. The effect of 6 G. 4. c. 16. is to take away this competition of creditors inter se, and to destroy the claims of the assignees of an insolvent debtor who afterwards becomes bankrupt. Look at the language of 5 G. 2. c. 30. and 6 G. 4. c. 16. There is a provision in sect. 135 of 6 G. 4. c. 16. that the act shall be construed *beneficially* for creditors. And should it turn out that the provision in 5 G. 2. is pointedly guarded, so as to apply only to discharges after that act, and that the provision in 6 G. 4. is general, without any such caution or guard, why should not 6 G. 4. c. 16. s. 127. receive a general construction, and apply to all discharges, whether before or after? Now 5 G. 2. c. 30. s. 9. enacts, "That from and after 24th June 1732, in case any commission of bankruptcy shall issue against any person or persons who *after the said 24th June 1732* shall have been discharged by virtue of this act, or shall have compounded with his, her, or their creditors, or delivered to them his, her, or their estate or effects, and been released by them, or been discharged by any act for the relief of insolvent debtors *after the time aforesaid*," that then and in either of those cases the body only shall be free from arrest, but their future effects shall remain liable to the creditors. Industrious attention is therefore bestowed to confine the operation of that act to discharges of bankrupts and insolvent debtors, where the discharges are subsequent to that act. There was good reason for that provision; the regulation was new in omnibus, and it would have been unjust to have visited with new punishment a discharge which at the time it occurred was subject to no penal consequences. Not so the act 6 G. 4. c. 16; for when that act passed a bankruptcy discharge under 5 G. 2. c. 30. after a previous discharge under that act as

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a bankrupt, or under a previous composition with creditors, or an insolvent act, made the future estate liable, if 15s. in the pound were not paid under the commission upon which the last discharge took place; but it only made it so liable if the creditors *seized*; and this produced a race amongst the creditors who should first be in a condition to seize.

Section 127 of 6 G. 4. c. 16. provides, that if any person who shall have been so "discharged by *such certificate as aforesaid*" &c. (stating the clause, *ante*, 128.) The difficulty arises upon the use of the word "such," such certificate as aforesaid. Had that word been omitted, there would have been nothing to have confined the other discharges by composition with creditors or discharge by an insolvent act. Had those words therefore stood by themselves, there was nothing to confine them to discharges after 6 G. 4. c. 16. came into operation. But it was argued, that the words "*discharge by such certificate as aforesaid*," are confined to discharges since 6 G. 4. c. 16., and have the same effect also as to discharges by composition or by the insolvent debtors' act. The court may doubt whether that is a legitimate conclusion; but taking the words "*such certificate as aforesaid*," if confined in their operation to discharges by certificates obtained since 6 G. 4. c. 16., is 6 G. 4. c. 16. confined to the discharges by certificates &c. (in the commencement of the clause) since that act? Sect. 121 is the first of several sections relating to certificates, and provides that every bankrupt who shall have duly surrendered and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands by this act made provable under the commission, in case he shall obtain a certificate of such conformity so signed and allowed, and

subject to such provisions as in that act are after directed; and s. 122 provides how future certificates are to be signed, introducing an alteration of the previous law. Both those sections refer to certificates introduced de novo by those clauses. Those sections apply to the new certificates introduced by 6 G. 4. But those are not the only subjects to which the words "such certificate as aforesaid" are referable; there are other sections which extend to every species of certificates. Section 123 applies not to certificates under 6 G. 4. c. 16. but to certificates signed previously to 6 G. 4. c. 16. but defective as to signature of one creditor, and one creditor only. That, therefore, is another description of certificate to which the word "such" in sect. 127 would apply. But the next sect. 126 seems decisive. That clause provides, "that any bankrupt who shall, after *his* certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand, hereby made provable under the commission against such bankrupt, shall be discharged on common bail." The words there are not "after such certificate as aforesaid," or his certificate *under this act*; and there are no words to confine it to certificates and commissions under 6 G. 4.; and unless it extends to certificates and commissions under 5 G. 2. there is no protection or privilege to persons having such certificate. 5 G. 2. is repealed, so that the protection and privilege that section gave is gone, and no new protection or privilege is given, unless under sect. 126. The construction then of sect. 127, is plain; it applies, under the words "such certificate as aforesaid," to discharges under any species of certificate, either under 5 G. 2. c. 30. or 6 G. 4. c. 16., and to every discharge by composition or insolvency either before 6 G. 4. or after; and there are two cases where it must have been so considered. The

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King's Bench does state its opinion though unnecessarily; and whoever remembers that great and eminent man Lord *Tenterden*, will bear testimony to the peculiar and great caution with which he abstained from deciding unnecessary points. In *Fowler v. Coster* (a) there had been three commissions against the defendant. The third was insisted to be a void commission, which it could not have been unless 6 G. 4. c. 16. applied to commissions issued under the previous statutes relating to bankrupts; that court then acted on the principle that section 127 was applicable to that case, nor can its judgment be otherwise supported. In *Robinson v. Score* (b) there had been one commission before 6 G. 4. c. 16. and another after. The defendant when sued pleaded bankruptcy. I agree that it was not necessary in that case to decide whether stat. 6 G. 4. c. 16. applied to commissions founded on 5 G. 2. c. 30.; for either 6 G. 4. c. 16. does or does not apply to by-gone commissions; if it does not, you have a discharge valid under 6 G. 4. c. 16. because you have one commission only, and cannot count preceding commissions; if 6 G. 4. c. 16. does apply, and you can count them, then sect. 127 of 6 G. 4. c. 16. is a discharge; for it would be most unreasonable that he should be sued when he could not be taken in execution, and when he could have no property liable to an execution. It was argued on 6 G. 4. c. 16. and its operation; and the court expressed their opinion, after consideration, that it was a case within sect. 127. applicable to discharges by commission previous to 6 G. 4. c. 16.

We are of opinion, on the contrast of the language of 6 G. 4. c. 16. with that of 5 G. 2., and of those two cases, that this case is within 6 G. 4. c. 16., and that you may apply that act to by-gone commissions issued

(a) 10 B. &amp; Cr. 427.

(b) 3 Bar. &amp; Adol. 338.

under 5 *Geo.* 2. c. 30., or 5 *Geo.* 4. c. 98. Mr. *Follett* pressed that such a decision would take away from assignees of an insolvent their chance of obtaining his future property. No doubt it will have that operation; but we think that so minute an interest in those assignees as not to affect the general interest conferred by this act, and that our decision, by taking away the previous competition among creditors, does not militate against the construction which we feel ought to be given to 6 *Geo.* 4. c. 16.

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Rule discharged.

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OWEN *against* BURNETT.

**A**SSUMPSIT against a carrier for not safely carrying a case of the plaintiff's containing a looking-glass from *London* to *Lymington*, or safely delivering the same according to the direction on the said case, but on the contrary so carelessly conducting himself, that by default of him and his servants the said looking-glass became and was cracked, broken, and injured. At the trial before *Gurney B.*, at the *London* sittings after *Trinity* term, it appeared that on 18th *June* 1831, the plaintiff, a looking-glass maker, had sent a glass valued at 37*l.* in a wooden case marked on one side "Plate Glass" and "keep this side up," and on one

A case containing a looking-glass of above 10*l.* value, marked on the outside "Plate Glass" &c., and directed to "Col. *Shedden, Elms, Lymington,*" was delivered at the office of the defendant, a common carrier in *London*, and booked there to go by his waggon.

Its size was

considerable, and its weight five cwt.; a notice was fixed in the carrier's office pursuant to 11 *Geo.* 4. and 1 *Will.* 4. c. 68.; no price was paid for its carriage, but for booking only; no declaration of its nature or value was made on behalf of the plaintiff pursuant to sect. 1 of the act; nor was any increased rate of charge for the greater risk and care incurred in its conveyance, or any engagement to pay the same asked or accepted by the defendant's servant on receiving the package. It arrived in *Lymington*, and was forwarded from thence on a narrow truck without springs, along a smooth road to the *Elms*, where it was discovered to be broken. The jury found negligence, and gave the plaintiff a verdict for the value of the glass: Held, on motion to enter a nonsuit, that the nature and value of the article in the case not having been declared at the time of delivering it at the defendant's office, and gross negligence not being found by the jury, the carrier was protected by the express words of 11 *Geo.* 4. and 1 *Will.* 4. c. 68. s. 1.



*mington*, was laid flat on a long narrow brewer's truck without springs, and with its edges extending much over the sides of the truck. Thus placed, it was drawn by one horse along a smooth road for about a mile to the house of Col. S., and left in the passage there. Up to this time no rattling of broken glass had been heard, but when unpacked it was found to be broken, and was sent back to the plaintiff, who refused to take it or pay for the carriage. *Coleridge* Serjt. for the defendant contended that the plaintiff must be nonsuited, the value and nature of the package not having been declared by the person delivering it, and no increased charge or engagement to pay it having been accepted by the person receiving the package. The learned baron reserved the point, giving leave to move to enter a nonsuit, and left it to the jury to say, whether it was carefully carried from *London* to the place to which it was directed (*a*), and whether the defendant was guilty of any negligence which occasioned the accident; adding, that if it had happened by negligence of the plaintiff or his packer, the defendant was entitled to a verdict; and secondly, whether a notice was put up in the defendant's waggon office, pursuant to 11 *Geo. 4.* and

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ten pounds, the increased charge over and above the common and ordinary charge for carriage is as follows :

| For any distance<br>not exceeding | For each pound sterling in value,<br>the sum of |
|-----------------------------------|-------------------------------------------------|
| 50 miles .....                    | one halfpenny.                                  |
| 75 .....                          | three farthings.                                |
| 100 .....                         | one penny.                                      |
| 150 .....                         | three halfpence.                                |
| 200 .....                         | seven farthings.                                |
| 250 .....                         | two-pence.                                      |

This notice is in the form now universally adopted by the land carriers since the above act.

(e) A carrier is bound safely to deliver a parcel at the place to which it was directed. Per *Wood B., Bodenham v. Bennett*, 4 Pri. 31, recognized 3 Br. & B. 182, by *Dallas C. J. in Duff v. Budd*.

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1 *Will.* 4. c. 68. s. 3. The jury found for the defendant on the last question, but, upon the first, found that the defendant had been guilty of negligence, and gave the plaintiff a verdict for 37*l.* the value of the glass (*a*). A rule was obtained in last term according to the leave reserved at the trial, Lord *Lyndhurst* observing, that as it was obvious that the mode of conveyance which might suit a small glass, would be highly improper for a large one, the knowledge of its value was the more important.

*Platt* showed cause in this term. This case does not come within the operation of 11 *Geo.* 4. and 1 *Will.* 4. c. 58. s. 1., the object of which, as appears from the recital, was to prevent carriers from being made liable without adequate consideration, for increased risks in conveying packages, which, from their small size, would not on the view of them appear to require more than ordinary care, though containing articles of great value (*b*). Among these articles "glass" is enumerated. But in the present instance the case sent was of considerable size, weighing 5 cwt., marked "Plate Glass," with directions enjoining particular caution, thus bearing on the face of it the character of value. Now by the proviso in s. 4. no public notice or declaration of value shall affect the common law liability of carriers in respect of any articles to be carried by them, but they shall be liable as at common law to answer for loss of or injury to articles in respect whereof they may not be entitled to the benefit of the act. Here, though no value was orally declared, the bulk and description of the package sufficiently declared its value. The act was only intended to put carriers in the same situation

(*a*) Note, no particular carrier had been pointed out by consignee. See 5 *Burr.* 2680 ; 3 *Br. & B.* 177 ; 1 *T. R.* 659.

(*b*) As in *Batson v. Donovan*, 4 *B. & Ald.* 21.

in which they were before, in cases where knowledge of the notice (a) usual before the statute restricting their common law liability, could be brought home to the owners of the goods: but in numberless cases for losses occasioned by their gross negligence they have been held liable, though the goods were above the value limited in such notice, and were not specially entered or insured; *Birkett v. Willan and Others* (b), *Duff and Others v. Budd* (c), *Batson v. Donovan* (d), *Smith v. Horne* (e), *Lowe v. Booth* (f). Thus that notice was held to protect the carrier only in cases when ordinary care was exhibited by him; nor has this statute any further operation; for if it has, it might be said that this glass might have been sent the whole way by the truck, because its value was not declared to the carrier (g). If then it is granted that before this act a carrier was liable for gross negligence after the usual notice given by him, negligence or not was a question for the jury, and the act does not apply. [*Bayley B. Negligence* is found to have existed, but not its character or amount. If the case should be sent to another jury on account of the insufficiency of the verdict on that head, the question raised for the defendant on the act might be put on the record.]

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*Coleridge* Serjt. and *W. C. Rowe* contra for the defendant. The general words of the enacting part of

(a) In *Smith v. Horne*, 8 Taunt. 146. *Burrough J.* fixed the date of the first recognition of the doctrine of notice to be 1785; *Forward v. Pittard*, 1 T. R. 27. and lamented its having been ever introduced into *Westminster Hall*.

(b) 2 B. & Ald. 356. (c) 3 Br. & B. 177. (d) 4 B. & Ald. 21.

(e) 8 Taunt. 144.

(f) 13 Pri. 329.

(g) It may be remarked, that by proviso in sect. 8, "nothing in the act is to be deemed to protect carriers from liability to answer for loss or injury to any articles arising from the felonious acts of any servant in their employ, or to protect such servant from liability for any loss or injury occasioned by his personal neglect or misconduct;" gross negligence by the carrier or his servant being thus left as at common law.

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s. 1., cannot be restrained from due effect, because the mischiefs recited out in the preamble are only pointed out in particular words (a). That section is to be read by itself absolutely, being intended to protect carriers, whether of large or small packages, by means of the declaration prescribed. It enacts, that no carrier by land for hire shall be liable for the loss of or injury to several specified articles (b), including glass, contained in any parcel or package, which shall have been delivered either to be carried for hire, or to accompany the person of any passenger in any public conveyance, when the value of the article contained in the package shall exceed 10*l.*, unless at the time of delivery at the receiving house of such carrier, or to his book-keeper, coachman, or other servant, for the purpose of being carried or accompanying the person of such passenger as aforesaid, the value and nature of such article shall have been declared by the person sending or delivering the same, and such increased charge as thereafter (in sec. 2.) mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package. By sect. 2., when any package containing any of the above specified articles shall be so delivered, and its value and contents declared as in sect. 1., and such value exceeds 10*l.*, such carrier may demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public

(a) See the cases collected *Bac. Abr. tit. Statute (I). Vol. 6. 381, 6th edit.*

(b) *Viz.* gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of *England, Scotland, and Ireland* respectively, or of any other bank in *Great Britain or Ireland*, orders, notes, or securities for the payment of money, *English or foreign*, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them.

and conspicuous part of the office, warehouse, or receiving house, where such packages are received for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles: and it further enacts, that all persons sending or delivering packages containing such valuable articles as aforesaid at such office, shall be bound by such notice "without further proof of the same having come to their knowledge." By s. 3., when the value has been declared, and an increased rate paid or engagement to pay it accepted, the carriers are to give receipts for the package acknowledging it to have been insured, and are to lose the benefit of the act if they do not give such receipt or affix the notice specified in sect. 3. Sect. 4. has been stated (a). By s. 5. every office &c. used by a carrier for receiving parcels to be conveyed, is to be a receiving house within sect. 1.

The object of these and other provisions of the act was to put an end to nice questions of liability, and lay down a broad rule of dealing between carriers and owners of property, which should be suited to the changed circumstances of modern society. To effect this object the legislature has exempted carriers from liability for loss or injury who has not declared the nature and value of the article carried. So that even if a package, which by its description or size would put the carrier on his guard as to its value, was brought to him or his coachman &c. for carriage, a declaration of that value is equally necessary, or he is protected by the words of sect. 1. Glass, which is one of the articles specified, refutes the argument that the act only extends to articles of great value packed in small compass, for its value increases with its size.

(a) Page 136.

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If its value did not exceed 10*l.*, the carrier would have been liable, without any declaration; but if it did, its size was not that information of its value to which he was entitled by the act, which required its value and nature to be declared, that he may apportion the increased rate of insurance accordingly. On this view of the act, it might be contended that even if no notice were affixed in the office, a declaration of nature and value will be a condition precedent to bringing an action against a carrier in cases within sect. 1., except the loss accrued by the felonious acts provided against by sect. 8. It has been argued that this act is to be substituted for the notice by which, before it passed, carriers by their own act attempted to limit their common law liability. To sustain a defence grounded on such a notice, *i. e.* to prove a special contract between the parties for the carriage on specified terms, it was necessary to bring home to the party whose goods had been lost or injured, a knowledge that the carrier had so limited his liability (*a*). But that is now altered by sect. 2. If a package is delivered at any intermediate place on the road between the termini of the journey, and no declaration of the nature and value be made, will not sect. 1. apply to relieve the carrier from liability for loss of or injury to the articles enumerated., although no notice is put up pursuant to sect. 2 and 3, in the office, warehouse, or receiving house where such package is delivered, but only in the offices at the ends?

Then, if the carrier's exemption from his original liability no longer stands on the contract made with him in derogation of the common law, but on the act of parliament, the words of the latter in sect. 1 and 2 must inevitably prevail; and it can hardly be said that since this act the legislature intended that a carrier should be bound to carry at increased risks

(*a*) *Gouger v. Jolly*, Holt's C. N. P. 318; *Clayton v. Hunt*, 3 Camp. 27.

where he had not an opportunity to receive an increased rate of profit. Besides, in the cases cited, as well as in *Brooke v. Pickwick* (a), the jury found gross negligence, without reference to the nature of the articles conveyed. In the latter case the trunk which was rifled had either not been placed on the coach at all, or insecurely placed there. The placing this package on the truck might be injudicious: but gross negligence or wilful misfeasance is not here found (b). [They were here stopped by the court.]

BAYLEY B. (c).—We entertain no doubt that this case is within this act. The article carried falls within the words used in the first section, so that unless we see something there restraining its operation to particular descriptions of glass, and excluding it from this particular one, the act applies. Now it has been argued for the plaintiff that the section does not apply to the glass article in question, because it was of considerable size and weight; and it appears from the preamble to section 1. that increased risk had arisen to carriers from the practice of sending by public conveyances by land for hire, packages containing money, bills, notes, jewellery, and other articles of great value, in small compass, without such notice to them of their nature or value as would enable them by due diligence to protect themselves against loss by depredation. But is the enacting part controlled by those words of the preamble “articles of great value in small compass?” If it had been the intention of the legislature to confine the provisions of sect. 1. to the articles of small size but great value there enumerated, they would have been found not only in the preamble, but

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(a) 4 Bingham 218.

(b) *Viz.* The absence of that care which a prudent man would take of his own property; *Bodenham v. Bennett*, 4 Pri. 31; *Duff v. Budd*, 3 Br. & B. 182.

(c) Lord Lyndhurst was sitting on the equity side.

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in the enacting part of that section. The terms of sect. 1. are however general, and include every thing. Among the articles which it enumerates is glass, the value of which increases with its size; but it also mentions plated articles, the value of which, at least as compared with plate, is not in any degree commensurate with the size of the article. The terms of the section are general, and there seems no reason why it should not be applied to any glass article if exceeding 10*l*. in value. The carriage of glass requires particular attention, and imposes peculiar risk on the carrier, from the brittle nature of the commodity; and the term "glass" in the act being unlimited, we should not be justified in saying that it applies to small glasses only, and not to glass of every description. The object of the legislature was to enable the carrier to provide against the common accidents of a journey, and not merely against theft. Then there is a stipulation applicable to this particular article of glass, that the carrier shall not be liable, unless the nature and value of the article be declared and an increased charge or an engagement to pay it be accepted by the person receiving the package. That had a twofold object, viz., the apprising the carrier of the nature of the article, in order to his giving it the greatest degree of protection on the road, and the giving him increased compensation for his greater risk and liability. But in this case he was only paid according to the rate for an ordinary risk, though notice was fixed in the office of the terms on which glass would be carried. I think that this case is within the act, and that therefore the plaintiff cannot recover for the loss sustained; no wrongful conduct or gross negligence amounting to a misfeasance having been established to take the case out of the protection intended by the statute. Gross negligence has in many cases been held to affix a liability on a carrier to which he would not have otherwise been subject. Thus, had

the defendant dashed the glass on the ground, that wrongful act would have made him liable. In one case where the carrier was held liable as for gross negligence, he delivered the article to a wrong person (a): in others, a mode of conveyance different from that agreed for was substituted (b), and in another, the article was carried to a point beyond the right one, or, as in *Smith v. Horne* (c), it was left unprotected in a cart in a street in *London*. In all those cases misfeasance had taken place; whereas here there is no misfeasance or gross degree of negligence throwing the responsibility on the carrier notwithstanding the act. The supposed negligence here imputed is that of carrying a package containing glass on a truck for a mile along a hard smooth road. But if that mode of carriage was not the safest, still, had the carrier been informed of the value, he might have used a greater caution amounting to extraordinary diligence. The consequence is, that the rule for entering a nonsuit must be made absolute.

VAUGHAN B.—On the plain construction of this act I am of opinion, that in order to make the carrier liable the consignor is bound to make a declaration to him of the nature and value of the goods to be conveyed, when they are of any of the kinds enumerated in sect. 1.; and that so doing is a condition precedent to any right to sue the carrier. Had gross negligence appeared, the carrier would have been liable notwithstanding the act.

BOLLAND B. had left the court to attend chambers.

GURNEY B.—I concur in thinking that in this case

(a) *Birkett v. Willan*, 2 B. & Ald. 356; *Duff v. Budd*, 3 Br. & Bingh. 356; very similar circumstances.

(b) *Vin. Stage-coach* for mail; *Garnett v. Willan*, 5 B. & Ald. 53; *Stout v. Fagg*, 5 id. 342; *Wright v. Snell*, 5 id. 350.

(c) 8 Taunt. 144; *Holt's N. P. C.* 643. In *Batton v. Donovan*, 4 B. & Ald. 21, the parcel was left in the mail in the street at *Berwick-on-Tweed*.

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the declaration of the nature and value of the glass was a condition precedent to recovering against the carrier for any thing short of wilful misfeasance. I was of that opinion at the trial, but as the question on the act was new, I thought it safest by giving leave to move to bring it for the consideration of the court.

Rule absolute.

DOE on demise of MASLIN *against* PACKER.

An ejectment was brought and notice of trial given in *December* for the next assizes, but without paying the taxed costs of a former ejectment, brought for the same premises by the defendant against the lessors of the plaintiff, in which judgment had been had against the casual ejector, and possession delivered to the defendant. A rule afterwards obtained for staying the proceedings in the second ejectment till such costs were paid, together with those of an action for mesne profits, was made absolute. Such a rule will not be enlarged in order to set off the costs claimed against any to which the lessors of the plaintiff may become entitled on the trial of the second ejectment. (See *Reg. Gen. Hil. 2 Will. 4. No. 93.*)

**T**YRWHITT had obtained a rule, calling on the lessors of the plaintiff to show cause why all further proceedings should not be stayed till the taxed costs of a former ejectment brought in the K. B. on the demises of the defendant and one *Pettit*, for the same premises, against the present lessor of the plaintiff, and also the costs (a) of an action for the mesne profits of the same, brought by the defendant against him should be paid. The affidavit of the defendant's attorney stated, that on 13 *May* 1833 the present lessor of the plaintiff was served with an ejectment on the demises of the defendant and another, to recover the premises in question, and that judgment was signed in K. B. against the casual ejector, and the defendant

(a) *Doe d. Pinchard v. Roe*, 4 East, 585. See *contrà*, as to *damages* in action for mesne profits, *Doe v. Barclay*, 15 East, 233.

put in possession by the sheriff on 29 *July*. Defendant soon after brought an action for the mesne profits, which is still pending. On 30 *September* the present ejectment was served on defendant to recover the same premises, both parties claiming under *J. P.*; the defendant by his will, and the lessors of the plaintiff deducing title under an instrument said to have been executed by him. Issue having been joined on the 17 *December*, notice of trial for the *Berkshire* assizes next ensuing was then given.

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*R. Alexander* showed cause on affidavits that the declaration in the former ejectment, served on *Maslin*, was not explained, or more than a small portion read to him, and that he remained ignorant of its meaning till the writ of possession was executed. He also suggested that this application was too late after notice of trial given, and that at all events the rule should be enlarged till after the trial of the present ejectment, when the costs now claimed might be set off against those recovered by the lessors of the plaintiff, if successful.

*Tyrvohitt* in support of the rule. First, as to the service, a sufficient knowledge by *Maslin* of the object of the declaration appears on the affidavits, notwithstanding the fact there disclosed, that *Maslin* interrupted the explanation of the contents and threw the declaration into the street. It was afterwards seen in his attorney's hands. Next, this rule was obtained in time; for no expense can be fairly supposed to have been yet incurred in preparing for trial at the next assizes. In *Doe d. Chadwick v. Law* (a), where a similar objection was made, the rule had not been

(a) 2 Bla R. 1158.

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obtained till six days before the day for which notice of trial of the second ejectment had been given at the sittings; but though the expense of preparing for trial and bringing witnesses to town had been there incurred according to the notice, the rule was made absolute. On the last point, *Reg. Gen. Hil. 2 W. 4. No. 93*, (a) shows, that the costs, even if cotemporaneous, could not be set off between the parties to the prejudice of the attorney's lien.

BAYLEY B.—Under all the circumstances of this case, I am of opinion that this rule should be made absolute. Application should have been made to the Court to set aside the judgment against the casual ejector on the ground of any irregularity which might have been supposed to have existed in the service; but no such application was made even after the action for mesne profits was brought. It also appears to me, that this notice of trial could only have been given at so early a period as it actually was, in order to prevent this motion. The rule is perfectly clear, that after a party in an ejectment has failed to appear, or has had judgment, he cannot proceed in another action to recover the same premises, while the costs of the former ejectment against him, brought on the same title, or between the same parties, remain unpaid. No special circumstances exist in this case to exclude the operation of that rule against the present lessors of the plaintiff. With respect to the proposed enlargement of the rule, in order to set off the costs if the present action shall succeed, the costs now claimed would be subject to the attorney's lien in these particular suits against which the set-off is sought; so that by the general rule cited

(a) *Ante*, Vol. II. 349.

no set-off of costs between the parties could be allowed to the prejudice of that lien.

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VAUGHAN and GURNEY B.s concurred.

Rule absolute.

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CLARANCE *against* MARSHALL, Clerk.

**D**EBT for money had and received by the defendant to the use of the plaintiff: plea, general issue.

The particulars of demand were for 12*l.* 10*s.*, for rent of certain copyhold land in *Essex*, alleged to have been received by the defendant on account of the plaintiff, from September 1826 to September 1832. At the trial before Gurney B. at the London sittings after last Trinity term, the circumstances of the case were nearly as follows:—It appeared from the copies of the court rolls produced in evidence, that in July 1790, *Amos Swan*, who had been admitted to a copyhold in the manor of *Garnons*, in *Essex*, surrendered it to the use

In 1810 the defendant's wife died seised of certain freehold, with which was intermixed certain copyhold, to which she had been admitted in 1804. She left surviving her, the defendant and an only daughter, who was shortly after

admitted to the copyhold, and married in 1815. The defendant remained in possession of the freehold ever since as tenant by the curtesy; and also of the copyhold ever since, letting them both from time to time together at an entire rent, and never recognizing any right in his daughter or her husband to either copyhold or rent. No title was proved except from the court rolls of the manor. It was insisted that the defendant's possession must be taken to have continued for the protection of his daughter's right, and that he was therefore her agent for receipt of the rent of the copyhold, liable to an action by her husband to recover it, as money had and received to his use. Held, that the husband could not maintain that action against the defendant without proving such an agency, or some recognition by him of his daughter's right, so as to establish a privity between the plaintiff and defendant, and avoid the question of title, which would otherwise have arisen.

*Scinde*, the husband might sue alone.

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of his will, by which he bequeathed his whole property, consisting of some freehold intermixed with copyhold, to his widow for life, to *Elizabeth* his daughter, wife of *J. Freeman*, for life, to *J. Freeman* for life, and lastly, to his grand-daughter (the wife of the defendant) for life, and to the survivor of the four(a). *Mrs. Marshall* having survived the three former devisees, and claiming by descent as sole heiress of *Swan*, took possession of the freehold, and in *October 1804* was admitted tenant of the copyhold, being described on the roll as sole heiress of *Elizabeth Freeman*, there described as owner of the fee to herself and her heirs. In 1810 *Mrs. Marshall* died intestate, seised in fee of both freehold and copyhold, leaving a daughter a sole heiress, who in the *November* of the same year was admitted tenant of the copyhold. The defendant administered to his wife, but it did not appear whether he was cognizant of the fact, that either she or his daughter had been admitted, nor was it shown that the daughter was a minor or not at that time(b). From the time of his wife's death in 1810 to that of the action brought, the defendant had the entire uninterrupted possession of the copyhold as well as the freehold, and let them from time to time, but always together to one tenant at an entire rent(c), and constantly received the rents without accounting to his daughter. There was no distinct evidence whether the rents were received by him or not in his wife's life-time after her admission in 1804, but it was not disputed that they

(a) See *Tomlinson v. Dighton*, 1 Peerc Williams, 149.

(b) It was suggested, that on the death of *Mrs. Marshall* in 1810, the lord conceived the defendant to be entitled to the copyhold as tenant by the curtesy, which he supposed to be the custom of the manor. On subsequent search of the rolls no instance proving such custom appeared, whereas the heirs of female copyholders dying intestate leaving husbands, had been always admitted on such deaths taking place.

(c) The copyhold was in value 10*l.* a year, one-fourth of the whole.

were, and there was no other evidence of the title of any party to the premises except from the court rolls. In 1815 the defendant's daughter married the plaintiff.

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Upon this evidence, *Coleridge* Serjt., for the defendant, objected that the plaintiff's claim being virtually for rent, and there being no proof of privity between the parties or that defendant had ever admitted any right of the plaintiff or his wife to the copyhold, the question resolved itself into one of title, which could not be tried in this form of action, *Marshall v. Hopkins* (a); and also that though the defendant's liability arose, if at all, from an implied contract, the foundation of which was the wife's title, she was nevertheless not joined in the action as co-plaintiff; and the learned Baron gave leave to enter a nonsuit, subject to which the plaintiff had a verdict for 60*l*. A rule having been obtained accordingly,

*Erle* showed cause. First, the action of *indebitatus assumpsit* for money had and received, has been held to apply to a case like the present, where though no contract between the parties can be shown, money has come to the hands of the defendant which he has no right to keep, and which ought to have been paid to the plaintiff, *e. g.* the profits of an office usurped by the defendant; *Arris v. Stukely* (b). The defendant came into receipt of the rent of the copyhold in 1804, as husband of the heiress, and continued in it in her right till 1810, afterwards till 1815 as guardian of his daughter, and since as bailiff or agent to her and her husband. That is not a possession by the defendant adverse to the right of his daughter, so as to

(a) 15 East, 309.

(b) 2 Mod. 260; see 2 Lord Raymond, 703.

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raise a question of title which would not be triable in this form of action. The defendant did not hold adversely to the title of his daughter but consistently with it, for he having staid in after her title accrued by admission consequent on her inheritance, must be taken to have received the rent as her bailiff, though he originally came in in right of his wife. The presumption of law is, that he entered as father and guardian of his daughter, the heiress, in order to protect and preserve her possession; see *Plowden*, 306; *Co. Lit.* 242 a; *Lit. s.* 396; 1 *Rolle's Abridg.* 659, tit. Disseisin (C) pl. 13. p. 659 (a); *Bull. N. P.* 102 b, *Page v. Selaby*. And the law will not presume an adverse claim by him. [*Bayley B. Doe v. Keen* (b) shows that where a mother died and her copyhold descended to her daughter, she, if an infant, might consider her father's entry as being for her use, so as to transmit her right to it to her heirs.] The length of his possession will not make this possession adverse, for the origin of it being shewn, it will be presumed to continue the same in the absence of positive evidence to the contrary, *Doe d. Fenwick v. Reed* (c). *Arris v. Stukely* (d) was indebitatus assumpsit for money received by the defendant to the use of the plaintiff for the profits of an office, and *Pollexfen*, for the defendant, argued that that form of action would not lie for want of a privity of contract; but the court held the contrary, saying an indebitatus assumpsit for rent received by one who pretends a title, for in such case an account will lie. *Hasser v. Wallis* (e) is a case where a woman whose rents had been recovered

(a) The passage in Rolle is thus stated in a similar title and placitum in *Viner*:—If guardian by nurture makes a lease by indenture to one being under the title of the infant, rendering rent to himself, which is paid accordingly, yet this is not any disseisin to the infant. P. 3. Ja. B. R. per *Tanfield*.

(b) 7 T. R. 386.

(c) 5 B. & Ald. 232.

(d) 2 Mod. 260. 263.

(e) 1 Salk. 28.

by a person who she supposed her husband, was held intitled to recover them from him in this form of action, after discovering that he had a former wife living. *Lindon v. Hooper* (a) will be cited to show that ejectment was the proper remedy by which the possession and mesne profits might have been recovered from the tenant in possession, but it seems that he would be discharged by payment to the defendant, the apparent owner, without notice to the contrary from the party entitled (b). Secondly, assuming the present to be the proper form of action, the plaintiff was not obliged to join his wife as a co-plaintiff. [*Bayley B.* Can this plaintiff, who has a joint estate with his wife, never having been admitted to sole seisin, maintain this action in his own name? The husband's right results from the wife's legal copyhold interest in and right to the seisin of this land before coverture; then if she alone is legal copyholder, she only, or her husband joined with her, are entitled to the legal profits.] That might apply had the action been use and occupation of the wife's land. [*Bayley B.* *Bidgood v. Way* (c) shows, that to join her in that form of action without alleging the land to be hers in the declaration, is error.] But many cases cited in *Comyns's Digest*, tit. *Baron and Feme*, (X.) (d) show that in actions for a rent or profit accrued during coverture to the husband in right of his wife, he has the option to join his wife or sue alone, in which last case the damages would go to his executors, whereas in the former they would survive to her. But this is not an action in respect of the land, or

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(a) *Cowper*, 418 ; see 15 *East*, 313.

(b) 1 *Salk.* 28. Qu. See *Cunningham v. Lawrents*, Clerk, 1 *Bac. Ab.* 260, 6th edit.

(c) 2 *W. Bla.* 1236.

(d) Particularly *Osborne v. Walladen*, 1 *Mod.* 273, per *Twisden J.*, supporting *Wise v. Bellent*, Cro. Jac. 442.

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an ejectment on a wrongful possession, but is founded on the implied duty of the defendant as bailiff to account to the plaintiff in right of his wife for money received as profits of the estate. The plaintiff may sue alone for that money as a chattel of his wife, and the presumption of law under the cases of relationship is, that the long possession of the defendant was not adverse to her right. [*Bayley* B. Could the husband alone have maintained ejectment?]

*Coleridge* Serjt. *contra*. On the first point it has been assumed that the defendant could have no title to the possession but that under which his daughter claimed as heir, and that assuming her to have a good title, his possession could not be adverse so as to work a disseisin. For this purpose it was insisted that this case bore an analogy to the doctrine quoted from *Plowden*, *Coke*, and *Rolle*, that the entry and possession by a younger brother are considered to take place on behalf of the elder, on account of the privity of blood between them, (a) in order to rebut the presumption arising from all the facts, viz. that the defendant's long possession was adverse, and to make him a bailiff or agent to his daughter in respect of the rent of the copyhold. But there is no proof of her infancy at her mother's death, so that *Doe v. Keen* (b), in which Lord *Kenyon* rested his judgment on the fact of infancy of the heir at the death of the ancestor, does not apply. [*Bayley* B. There is no evidence that the father knew that his daughter had been admitted, that he ever accounted since 1810, or that his title was the same as her's.] His possession

(a) No longer in force as to transactions subsequent to 1 June 1833 ;  
3 & 4 W. 4. c. 42. s. 13.

(b) 7 T. R. 386.

has been apparently continuous and undisputed since 1810; he has from time to time let the copyhold together with the freehold, of which he is confessedly tenant by the curtesy, without accounting to his daughter or recognizing her title. *Jayne v. Price* (a) shows, that the circumstance of long uninterrupted possession in the neighbourhood of the party who had the apparent right to disturb it, is strong to show that possession to be adverse, and to rebut the presumption of a previous seisin in fee in another, from whom it would, in such case, have descended to the party who did not claim. Again, as this form of action is founded on the supposed agency of the defendant to his daughter, the plaintiff was bound to show her admission, after which the whole became a question of title not triable in this action, *Marshall v. Hopkins* (b). [Vaughan B. In *Cunningham and ux. v. Lawrents, Worcester* spring assizes 1788, 1st *Bac. Abr.* 6 ed. 260, tit. *Assumpsit*, (A.) the question was, whether, when the defendant claims title, an action of assumpsit for the rents received will lie against him; and *Wilson J.* nonsuited the plaintiff, being of opinion that the action should have been framed in ejectment.] The defendant may have thought himself to be tenant by the curtesy by the custom of the manor, which would be adverse to his daughter's title, though derived from the same source. He cannot be shown to be tenant to her. If he could be shown to be her bailiff, his lessee must be the plaintiff's tenant, and use and occupation would have been sustainable against him; but neither he nor his lessee, the actual occupiers, could be sued in that action for use and occupation, for want of privity of contract in both cases. Nor is that an action in which to try the title to land, per Lord *Kenyon*, *Trin.* 37

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(a) 5 Taunt. 326.

(b) 15 East, 309.

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*Geo. 3. (a)* [*Bayley B.* The same principle is acted on in *Lindon v. Hooper (b)*, on the ground that a defendant may be unprepared to meet, in this form of action, the questions which belong to another. There the party who had paid money for release of cattle taken damage feasant under a distress which turned out to be illegal, was not allowed to recover it back as money paid, on the ground that had he sued in replevin or trespass, the defendant would have been properly prepared to meet the various questions which would arise respecting the distress.] Nor is there privity between the plaintiff and the defendant as to the receipt of this money, *Stephens v. Badoock (c)*, *Baron v. Husband (d)*. This never was the money or rent of the plaintiff recovered by the defendant (e), for the defendant had let the copyhold, assumed to belong to the plaintiff, at an entire rent, with his own freehold. No action of account would lie here as in *Arris v. Stukely (f)* it would have done for the known fees of the plaintiff's office received by the defendant. Thus, in *Howard v. Wood (g)*, the Court say it would be hard, perhaps, to maintain this action even for the fees of a steward of a court-leet were it then a new case. In both those instances it was probably permitted, in order to prevent the necessity for an assize. In *Arris v. Stukely* it is said *arguendo*, where one receives my rent I may charge him as bailiff or receiver, so if one receives *my money* without my order; but that does not apply to cases where there is any question about the

(a) MS. cited in *Woodfall's Landlord and Tenant*, 2d ed. 434.

(b) Cowper, 418.

(c) 3 B. & Adol. 354.

(d) 4 B. & Adol. 611.

(e) See *Yates v. Bell*, 3 B. & Ald. 643; *Williams v. Everett*, 14 East, 583.

(f) 2 Mod. 260.

(g) 2 Levins, 245.

title to the rent. [*Vaughan* B. alluded to *Doe v. Brightwen* (a).]

*Cur. adv. vult.*

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BAYLEY B. afterwards delivered the judgment of the court. This was in form an action of assumpsit for money had and received, founded on the following circumstances:—The daughter of the defendant, shortly after the death of her mother in 1810, and while living with her father, was admitted to a copyhold to which her mother had been in her life-time admitted; and in 1815 married the plaintiff. The rents and profits of this property have been received by the father from 1810 to this time, as in all probability they had previously been since 1804, when his wife was admitted to it. She, as it would seem, inherited it together with some freehold with which it was intermixed. It does not, however, distinctly appear by whom the rents were received between 1804 and 1810. It was insisted for the plaintiff that since the latter period the defendant must be considered to have received the rents on her account and to her use, and that therefore his possession could by no means be taken to be adverse to her title, but should be considered as that of an agent for her before her marriage, and for the plaintiff, her husband, after. But in order to maintain the present action for the rents, as for money had and received by the defendant to the use of the plaintiff, the defendant's agency to him must be clearly made out; for though without doubt a principal may thus recover against his agent money received on his account, still if a case of adverse possession or ownership by the agent in his own right should be interposed, it would put an end to any remedy sought in this species of ac-

(a) 10 East, 588.

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tion. It seems to us that some evidence was necessary to be given for the plaintiff to establish the relation of agent to the plaintiff. But here was nothing to show the copyhold to have been dealt with, or rents received by him in that character, or any otherwise than as owner. He had let the land in question from time to time, and was not shown to have recognized the plaintiff or his wife as his principals. No title in any of the parties was shown, except from the court-rolls; from them the title appeared to have been only in the wife of the defendant and his daughter, but whether the defendant was privy to, or appeared at the admission of either did not appear; and though admission is in general necessary to clothe a party interested in copyhold with a legal right to it, it is known to be easily obtained, as it is left to other means of proof to show how the party admitted is entitled to the estate in the copyhold. However that may have been, we are of opinion that in the absence of proof of agency of the defendant, or recognition by him of any paramount right in his wife, his daughter, or the plaintiff her husband, the present verdict cannot stand. But as it might have been in the plaintiff's power to have proved such agency at the last trial, had that point been insisted on, or as it might be procured in the event of a new trial being granted, we think that the plaintiff should have the option of having a new trial on payment of costs, or submitting to judgment of nonsuit.

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LEWIS *against* EICKE.

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ON the 4th *November* the sheriff of *Kent* seized goods at the house of the defendant under a *testatum fi. fa.*; and on the 5th was ruled to return the writ. On the 6th he was served with a notice by the defendant, *Charles Eicke*, that the goods were the property of, and claimed by, *William Eicke.* *W. Eicke* was the defendant's brother. The sheriff thereupon obtained a rule under 1 & 2 *W. 4. c. 58.* calling on the execution creditor and claimant to appear and maintain or relinquish their respective claims to the goods.

*Hutchinson* showed cause for the plaintiff, on affidavits throwing suspicion on the transaction between the brothers, and noticing that the notice of claim was not given by *W. Eicke* but by the defendant.

The claimant did not appear, upon which the following rule was made:—"That the said rule be discharged, as far as regards the plaintiff in this action, and that the claim of *W. Eicke*, named in the said rule, be barred, the sheriff to have six days time to return the writ of *fi. fa.* herein, and that the defendant and the said *W. Eicke* respectively show cause on the second day of next *Hilary* term, why they, or one of them, should not pay to the plaintiff and to the said sheriff their respective costs of and occasioned by the said rule, on notice of the rule to be given to the defendant, and also to *W. Eicke*."

Afterwards in this term *Humfrey* showed cause on behalf of *W. Eicke* against the last-mentioned rule, which was made absolute against the defendant *Charles Eicke*.

Where on a rule obtained by a sheriff under the adverse claim act, 1 & 2 *W. 4. c. 58.* the claimant did not appear, the court discharged the rule as regarded the plaintiff in the cause, and barred the claim of the claimant, and called on him and the defendant to show cause why they, or one of them, should not pay the plaintiff and the sheriff their respective costs occasioned by the rule.

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SUMMERS *against* MOSELEY, Esq. Sheriff of  
Shropshire.

A party served with a subpoena duces tecum is bound to produce the required document in court, and need not be sworn. Thus in an action against a sheriff upon 32 Geo. 2. c. 28. for a penalty incurred by the act of his officer in taking a party arrested under mesne process to a tavern, without his free and voluntary consent, it was held, that the officer, after being served with a subpoena duces tecum on the part of the plaintiff, must produce his warrant in court without its being necessary to swear him as a witness.

Carrying an arrested party to public-houses within twenty-four hours from the arrest without lodging him in gaol within that time, is not a beginning to "carry to gaol" within 32 G. 2. c. 28. s. 1.

*Semble*, if a party is arrested on mesne process, and when called on by the officer to name a safe &c. dwelling-house to which he will be carried, names his own house, to which the officer objects pursuant to sect. 1. of the act, he cannot be carried to any tavern &c. without his free consent.

DEBT on 32 Geo. 2. c. 28. ss. 1 and 2., for penalties.

The first count stated the arrest of plaintiff by the defendant, then and there being sheriff of *Salop*, by virtue of a writ of capias, at suit of *William Goodall*, directed to the said sheriff, and indorsed for bail for 27*l.* 2*s.* 7*d.* That plaintiff being so arrested for the cause aforesaid by virtue of the said writ, defendant not regarding the statute &c., conveyed and carried &c. the said plaintiff so by him, the said defendant, arrested and being in his custody by virtue of the said writ, to a certain tavern, alehouse, and public victualing house, belonging to one *W. S.*, called the *New Inn*, situate and being in *Bridgnorth*, without the free and voluntary consent of him the said plaintiff, and against his consent and will, and did then and there keep and detain him the said plaintiff, so by him the said defendant arrested and being in his custody, by virtue of the said writ, at and in the said tavern &c., ten hours then next following, without his free &c. consent, and against the consent and will of him the said plaintiff, contrary to the said statute, &c., concluding under the statute for a penalty of 50*l.* to the plaintiff, being the party grieved.

Second count. That plaintiff being so arrested and continuing in custody &c., defendant further disregarding &c., afterwards did carry and begin to carry the said plaintiff to a certain gaol within the said sheriff's

bailiwick, to wit, the gaol of our said lord the king of and for the said county, situate and being at *Shrewsbury*, in the county aforesaid, within 24 hours from the time of the said arrest, to wit, within the space of 11 hours from that time, against the will of the said plaintiff, contrary to the form of the statute &c., whereby &c., (not averring that the plaintiff had not refused to be carried to some safe and convenient dwelling-house of his own nomination &c.)

Third count, that plaintiff being so arrested and continuing &c., the said defendant further disregarding &c., did afterwards and whilst the said plaintiff was being carried on his way to gaol by the said plaintiff, as in the said second count mentioned, convey and carry &c. the said plaintiff to a certain other tavern &c. belonging to one *M. R.* called the *White Hart*, situate at *Much Wenlock*, in the county aforesaid, without the free and voluntary consent of him the said plaintiff, and against his consent and will, and did then and there keep and detain him the said plaintiff, so by him the said defendant arrested and being in his custody, by virtue of the said writ, at and in the said last-mentioned tavern &c. for and during the whole of the night of the day last aforesaid and until the morning of the following day, the same being a long space of time, to wit, the space of ten hours, without the free and voluntary consent, and against the consent and will of him the said plaintiff, contrary &c.

Fourth count, for carrying plaintiff to another tavern &c. called the *Mermaid*, in *Shrewsbury*, without his free &c. consent.

Fifth count, for conveying and carrying plaintiff to the private house of a certain officer of the said defendant as sheriff, without the free and voluntary consent of him the said plaintiff, and against his

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consent and will, and keeping and detaining him there for an hour, whereby &c.

Sixth count, for conveying plaintiff to another tavern &c. belonging to one *J. G.*, called the *Mason's Arms*, situate at *Shrewsbury*. Plea: general issue. At the trial at the last assizes for *Shropshire*, before *Gurney B.*, it appeared, that a writ of *capias* against the plaintiff, at suit of one *Goodall*, having been delivered to the defendant, he issued a warrant for his arrest, directed to three officers, named *Kinsey*, *Ambrose Jones*, another *Jones*, and to the county jailor. On the morning of the 22d May *Kinsey* met the plaintiff in *Bridgnorth*, and telling him he had a warrant against him at *Goodall's* suit, asked if he would pay the debt or give bail? The plaintiff answered, he would give bail. *Kinsey* asked him where he would go to? Plaintiff answered, to his brother's, which was a few yards off, that being also the plaintiff's own place of residence, (see 32 Geo. 2. c. 28. s. 1.) *Kinsey* said, no, we will go to the *New Inn*; plaintiff objected, that he and the landlord were at variance, but *Kinsey* said, they should not see him, and they continued to walk together in that direction, as they had previously done; and, on arriving there, went into the house, where the follower remained with the plaintiff all day. *Kinsey*, having gone elsewhere, did not return till the evening, and after much negotiation about a bail-bond, the refusal of which by the officer formed the subject of a second action, *Kinsey* proposed to plaintiff, at ten o'clock at night, that, as his friends did not come forward, he should go with him to *Shrewsbury*, there to see the *Ambrose Jones* to whom the writ was also directed, in order that, as the plaintiff was connected with him, he might be induced to settle the debt. They accordingly

set out in *Kinsey's* gig for that purpose, and, on getting near *Wenlock*, *Kinsey* asked the plaintiff to name the house where they should spend the night; on his answering, the *White Hart*, they slept there, and next day went to *Shrewsbury*, to the *Mermaid Inn*, to see *Ambrose Jones*, who was expected there. He not being arrived, *Kinsey* and plaintiff walked together to the house of the former, and afterwards towards *Jones's* house, but stopped at the *Mason's Arms* on the way for an hour, from whence they went to the *Mermaid*, where *Jones* came and took a bail-bond executed by the defendant and one *Elcock*. Notice was given to the defendant's attorney, who was in the under-sheriff's office, to produce the writ and warrant. After protest by the under-sheriff against producing the writ in this action against the sheriff (*a*), he produced the writ which had not been returned (*b*). The writ was thus indorsed, "This writ was executed by me the 22d May 1833, by arresting the defendant. *W. Kinsey*." Next, in order to connect the sheriff with the act of his officer, *Kinsey* having been released in all the three actions, was then called by plaintiff, on his subpoena *duces tecum*, to produce the warrant. He refused to produce it till sworn as a witness; but on an intimation from the court, produced it, leave being given to the defendant to move for a nonsuit, if it had been improperly received. It was identified by the under-sheriff, as having been lately returned by him to the officer who had left it at the office, as was often his practice; whether the warrant was thus returned to him before or after the notice to produce it had been served by the plaintiff on the defendant's attorney, did

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(a) See *Snowball v. Goodricke*, 4 B. & Adol. 541.

(b) The sheriff had not been ruled by the plaintiff to return the writ, when the writ or executed copy might have been procured from the *custos brevium*.

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not appear (a); and, on comparing the writ with the warrant, the indorsement on the former was discovered; but it was not shown to be the course of office for the under-sheriff to write on the writ the name of the officer selected to execute the warrant, though it was the course to enter his name in a book kept at the sheriff's office containing entries of the writs. This book was sent for at the judge's request to the under-sheriff, and the entry inspected, but it did not mention *Kinsey's* name. No course of office, calling on the bailiffs to indorse on writs the day of their execution, was proved. It was next objected, that the second count, charging the defendant with carrying and beginning to carry the plaintiff to the county gaol, was not supported in evidence, no "carrying to gaol" being shown; and that a "beginning to carry" was not actionable within the act. The plaintiff had a verdict on the two first counts for two penalties of 50*l.* each, with leave to the defendant to move to enter a verdict for the defendant, or reduce the damages to one penalty only. In *Michaelmas* term a rule was granted on both points; *Bayley B.* observing on the latter, that *Dewhirst v. Pearson* (b) showed, that in a case where the party is actually carried to prison, the twenty-four hours are to be counted from the arrest to the time when the officer began to carry him thither.

*Ludlow Serjt.*, and *Whateley* showed cause. *Davis*

(a) Upon this *Bayley B.* remarked, that to return it to the officer after the notice would not have been proper, and seemed to think, that if the officer parted with the custody of the warrant by returning it to the sheriff, its safe place of deposit was in the sheriff's office, and not in the officer's hands; and that if it was directed to more than one officer, it was the sheriff's duty to be aware which of them had executed it.

(b) *Ante*, Vol. III. 242; see *Simpson v. Renton*, 5 B. & Adol. 35. S. P.

*v. Dale (a)*, *Rex v. Murlis (b)*, *Bradley v. Ricardo (c)*, and *Newland v. Reeves (d)*, show that a person subpoenaed to produce a document and appearing in court, may be compelled to produce it without being sworn by the party who subpoenaed him, so as to enable the opposite party to cross-examine him. They also cited *Rex v. Netherthong (e)*. [Bayley B. This is not the ordinary case of a bailiff who has kept his warrant, but of a bailiff who, having returned it to the sheriff, has got it back again. The consequence would be, that the officer, the real defendant in the case, may be called on to produce it, and, if sworn, would give evidence in what is in fact his own case.] It has even been held in *Simpson v. Smith (f)*, that where a witness, a magistrate, though sworn, was merely called to produce an information in his possession, and no question was asked him, the adverse party cannot cross-examine. The subpoena duces tecum, in requiring a witness to be and appear &c. to "testify the truth according to your knowledge," means to testify if called on; he must attend, though he may know nothing upon which the other part of the writ operates; and when he appears in court, but does not produce there the papers demanded by the duces tecum, though they are in his possession, without excuse for withholding them to be held valid by the court, he is liable to an action, according to *Amey v. Long (g)*. Besides, the indorsement on the writ was sufficient evidence to go to the jury, as connecting the sheriff with the act of his officer;

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(a) M. &amp; M. 514; 4 C. &amp; P. 335, S. C.

(b) M. &amp; M. 515.

(c) Cor. Littledale J., Gloucester S. A. 1831.

(d) Cor. Parke J., Lancaster S. A. 1831.

(e) 2 M. &amp; S. 337.

(f) 1 Phil. 260; 1 Stark. Ev. 2d ed. 161; cor. Holroyd J., Nottingham S. A. 1822.

(g) 9 East, 473.

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*Blatch v. Archer* (a), *Scott v. Marshall* (b), *Snowball v. Goodricke* (c). [*Bayley B.* Evidence of a regular course of that sheriff's office was given, but the indorsement there relied on "*Radford and Co.*" is not so strong as that made in this case.] On the second point the object of the statute was remedial, to prevent the party arrested from being hurried away from his friends within 24 hours, so as to have no time to procure bail—an act equally injurious to him as if he was taken absolutely to gaol in that time. [*Bayley B.* The only question is, when the defendant began to carry the plaintiff to gaol? That depends on whether he was actually carried thither.] *Dewhirst v. Pearson* (d) shows that beginning to carry to gaol within the 24 hours is against the act, though he be not lodged there within that time. Putting a defendant in course of removal towards gaol within 24 hours from the arrest, entitles him to the benefit of this act, whether he be lodged in gaol or not; or he might have been carried about the country in custody without remedy under this act, not having been finally lodged in gaol. The distinction between "gaol" and "prison" in the act are, that one is the sheriff's county gaol, the other, any other place of confinement within the county.

The *Court* intimated their clear opinion that the plaintiff had not been "carried to a gaol or prison" within the act, by accompanying the office rto the different inns and other places in *Wenlock* and *Shrewsbury*.

*Talfourd Serjt.*, and *Godson*, in support of the rule. The counsel for the plaintiff relied on the warrant to prove the connection between the sheriff and the bailiff

(a) Cowp. 63. (b) *Ante*, Vol. II. 257. (c) 4 B. & Adol. 541.  
 (d) *Ante*, Vol. III. 242.

without calling extrinsic evidence of that fact. [*Bayley* B. I think the evidence was complete to go to the jury before the writ was put in.] The main point whether there is authority in the crown or its courts of justice to call on a person to produce a document belonging to him, without his being entitled to be sworn as a witness, is still open to argument, notwithstanding the *nisi prius* decisions since 1822. The clause of *duces tecum* was engrafted on the original *subpœna* in order to call on the party summoned to appear as a witness to produce a document also, but is not absolutely imperative where the witness has an interest in it as his authority to do a particular act; *Miles v. Dawson* (a). [*Bayley* B. In every case where the party *subpœnaed* brings the document into court, the judge has a discretion to prevent the production of it, if it would expose him to penalties or be prejudicial to his clients (b). The liabilities of witnesses for not appearing pursuant to process should be considered. The stat. 5 *Eliz.* c. 9. s. 12., gives a remedy by action against persons on whom any process out of any court of record shall be served to *testify or depose* concerning any cause depending in any court. [*Bayley* B. I could not find a precedent of a *subpœna* before the statute of *Eliz.* It is probable that the language of that act was afterwards adopted in the writ in order to secure the remedy given by sect. 12.] It has never been decided that a man is bound by this writ to produce a document of his own in any court. In *Rex v. Netherthong* (c), the rated inhabitants' overseer called on behalf of his own parish to produce a certificate from the parish chest, would have been incom-

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(a) 1 Esp. R. 405.

(b) See cases collected 1 Stark. on Ev. 2d ed. 87, n.

(c) 2 M. &amp; S. 337.

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petent as a witness for the party calling him, but being the mere depositary of the parish muniments, was on that account suffered ex necessitate to produce the document in question. [*Bayley* B. Consider the effect of a subpoena calling on a stranger to produce a particular document of which he is possessed, without a clause requiring him to testify.] If that clause might be left out, a party in the cause might be served with the other clause of duces tecum to which the subpoena would then be reduced, the objection to his giving evidence in his own case being removed. [*Bayley* B. That would be improper, for he should have notice to produce, which if disobeyed lets in secondary evidence; but could not the production of documents in evidence by a person not a party to the cause be compelled, before the time to which the clause of subpoena duces tecum can be traced? Such a power must have always resided in the crown for the advancement of justice in the king's courts.] Still it would be only in the character of witness subpoenaed to testify and depose that the party could be compelled to produce any document. In *Morgan v. Brydges* (a) in 1818, the inconvenience under which a plaintiff labours in this species of action, in being often obliged to prove the connection between the sheriff and himself, by the bailiff, the real defendant in the cause, was pressed on *Abbott C. J.*, who however held, that as he had been called as a witness he might be cross-examined. [*Bayley* B. There he was unnecessarily examined for the party who called him. There, as well as in this case, the sheriff being the defendant on the record might have called him as his own witness. In this particular case secondary evidence of the warrant might have been given.] In

(a) 2 Stark. N. P. C. 314. See *Rex v. Brodie*, id. 472; *Reed v. Jones*, 1 id. 132.

*Rex v. Brooke* (a), a witness who was sworn and produced a document was not asked a question, yet the same learned C. J. held the defendant entitled to cross-examine him. Lord *Ellenborough* had held the same in *Reed v. James* (b).

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*Cur. adv. vult.*

BAYLEY B. afterwards delivered the judgment of the court.—The question was, whether a bailiff to a sheriff having been called to produce a warrant had a right to insist on being sworn according to the ordinary forms used towards witnesses, which would give the counsel for the defendant the opportunity of cross-examining him, or whether the plaintiff could insist on the warrant being produced by him without his being sworn as a witness. As the cases which were cited in the argument were decided at *nisi prius*, we postponed our judgment in order to take an opportunity of conferring with the other judges. The result of our communication has been, that the decisions at *nisi prius* relied on for the plaintiff were rightly made, and that a sheriff's officer may be compelled to produce his warrant without its being necessary for the party calling him to have him sworn, or to ask him any question. There were particular circumstances in this case which might have made it unnecessary to decide this point (c); but as it has been argued, and is a question desirable to be settled by laying down a distinct rule of law on it, we have thought it right to pronounce our opinion.

The origin of the writ of *subpoena duces tecum* does not distinctly appear. No instance has been found of it before the reign of *Charles 2.*; *Amey v. Long* (d).

(a) 2 Stark. N. P. C. 472.

(b) 1 Stark. N. P. C. 132.

(c) The learned baron had thrown out, that as *Kinsey's* name was indorsed on the writ which was produced from the sheriff's office, that indorsement might be sufficient to connect the defendant with the act of his officer.

(d) 9 East, 473.

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But there can be little doubt that writs of subpoena to require the attendance of witnesses and the production by them of instruments in their possession, must have been in use before the passing of the act 5 *Eliz.* c. 9. There must have existed a common law right in the crown, for the purposes of justice, to compel by subpoena the attendance of every person cognizant of the subject-matter in suit, and also to produce any document bearing on that subject-matter, though in the possession of a stranger to the suit. Such a stranger is only called to produce a paper as and for the required document, not to identify it, which would be done by extrinsic evidence. In numberless cases, as the party producing a paper is wholly ignorant of every circumstance of the case, it would be absurd to swear him as a witness. When a party called on his subpoena duces tecum to produce the document required, disobeys the writ by not so producing it, I have no doubt that he is liable to attachment. Whether he could require to be sworn, not to give general testimony in the cause, but to make true answers as to the custody of the document only, is another question. But we think that he has no right to require the party who calls him to have him sworn in that way which would make him a witness in the cause for all purposes, for he might be a mere stranger to the document, though having the custody of it. The witness, therefore, in this case was properly called on to produce the warrant, and that production was properly enforced without swearing him.

Rule for entering a verdict for the defendant discharged; verdict to stand for the plaintiff for one penalty.

In a similar case in the K. B. in *Easter* term 1834, a rule for a new trial moved for on a similar ground was refused on the authority of this case (a).

(a) And see *Rush v. Smith* in this court, *Trinity* term 1834, *post*.

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EVANS qui tam *against* MOSELEY Sheriff of Shropshire.SUMMERS *against* Same.

CASE. The first action was brought on 23 *Hen. 6.* c. 9. for the penalty of £40 thereby imposed on persons refusing to take sufficient bail when tendered to an officer making an arrest on mesne process; and the second was brought by *Summers*, the party arrested, for the treble damages given by the same statute to the party grieved by a like refusal. The declaration in each case, after stating the arrest of the plaintiff by the defendant under a writ of *capias* at suit of *Goodall*, directed to the defendant and indorsed for bail for 27*l.* 2*s.* 7*d.*, averred that *Summers* tendered and offered to the defendant, so being sheriff as aforesaid, reasonable sureties of sufficient persons, to wit; one *S. S.* of &c., mercer, and *T. E.* of &c., timber merchant, two good and lawful men of the said county of *Salop*, they the said *S. S.* and *T. E.* being then and there responsible and sufficient persons, and having and each of them having sufficient within the county of *S.* aforesaid, in which said county the said *W. S.* was so arrested and so in custody as aforesaid, and who then and there were willing and offered to become bail and sureties for the said *W. S.*, that within eight days after the execution of the said writ on him, inclusive of the day of such execution, he should cause special bail to be put in for him in the court of Exchequer to the said action, according to the exigency of the said writ: Yet the said defendant, disregarding his duty and the statute, did not take the said bail or sureties, but wholly refused

A bail-bond dated the day on which an arrest took place, and shown to have borne that date on that day, though not executed till the next, was conditioned that the defendant should within eight days from the date thereof, inclusive of the day of such date, cause special bail to be filed in the Exchequer in a certain action &c. according to the form and practice of the said court. Held, in penal actions on 23 *Hen. 6.* c. 9. for refusing to take bail, that a bail-bond with such a condition did substantially comply with the uniformity of process act, 2 *Will. 4.* c. 39., which by the form in

Schedule No. 4. requires a defendant, within eight days after executing a *capias* on him, to cause special bail to be put in in the action at the hazard of the plaintiff's proceeding against the sheriff or on the bail-bond.

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so to do, and wrongfully kept and detained the said *W. S.* in the custody of the defendant as aforesaid.

Both causes came on for trial at the *Shropshire* assizes after the case last reported, and the testimony there given (see *ante*, p. 160.) was by consent permitted to stand as having been repeated in each of them. It was also proved, that the instrument produced as a bail-bond had been refused by the bailiff's follower in the absence of the bailiff on the day it bore date, viz. 22d *May*, which was also the day on which the arrest took place, but was not in fact executed till the next day. Its condition was as follows: "That if the above bounden *W. Summers* do and shall, within the space of eight days from the date hereof, *inclusive of the day of such date*, cause special bail to be filed in his majesty's court of Exchequer at *Westminster*, in a certain action, in which *W. Goodall* is plaintiff and the said *W. Summers* is defendant, according to the form and practice of the said court of Exchequer, then this present obligation shall be void, but otherwise shall remain in full force and virtue." The plaintiff had a verdict for a farthing in each case, *Gurney B.* refusing to certify in favour of the plaintiff for costs, giving the defendant the same leave to move as in the last reported case, and also reserving other objections. A motion was afterwards made in *Michaelmas* term in arrest of each judgment by

*Talfourd Serjt.* First, the bail-bond declared on and proved was not the obligation contemplated by 32 *Hen.* 6. c. 9., for by that statute no sheriff is to take any obligation for any person in his ward by course of law, but on condition written that he shall appear at the day and place "contained in the writ." That part of the act is still in force (*a*), and is not repealed by 2 *Will.* 4. c. 39., to the form of *capias* annexed to which act in *Sche-*


(a) See 32 *Geo.* 2. c. 28. as to the rest.

dule No. 4. the condition of the instrument so taken as a bail-bond appears to have reference. That form of a *capias* requires the party arrested to "take notice, that within eight days after execution of the writ on him, inclusive of the day of such execution, he should cause special bail to be put in for him in the court of — in the said action, and that in default proceedings may be had as in the warning indorsed on the writ." Bail-bonds taken since that act, after the obligatory part, recite thus:

"Whereas the above bounden (defendant) was on the day of        taken by the said sheriff in the bailiwick of the said sheriff, by virtue of the king's writ of *capias*, issued out of his majesty's court of       , bearing date at *Westminster*, the        day of       , to the said sheriff directed and delivered, against the said (defendant) in an action of        at the suit of (plaintiff): And whereas a copy of the said writ, together with every memorandum or notice subscribed thereto and all indorsements thereon, was, on execution thereof, duly delivered to the said (defendant): And whereas he is by the said writ required to cause special bail to be put in for him in the said cause to the said action within eight days after execution thereof on him inclusive of the day of such execution." The bail-bond is then conditioned to "put in special bail for the defendant to the said action in his majesty's court, as required by the said writ." The sheriff is entitled and bound to have every thing necessary to his security inserted in the bail-bond itself; whereas in this case it could only be made legal by parol and extrinsic evidence of the day on which the arrest took place. It is specifically alleged that bail were tendered to do a thing not justified by 23 *Hen.* 6. c. 9. It should have appeared by the bail-bond that the day of the arrest was the same with that on which it was executed. The days of appearance mentioned in the

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bond and declaration might be different. Rules having been granted as prayed,

*Ludlow* Serjt. and *Whateley* showed cause in this term. The condition of the bond to appear is conformable to the uniformity of process act, 2 *Will.* 4. c. 39., and is a substantial compliance with 23 *Hen.* 6. c. 9. The court then called on

*Talfourd* Serjt. and *Godson* to support the rules. To the arguments used on obtaining them, they added, that as a party might be arrested one day and give a bail-bond the next, and the day of the date of the bond was not necessarily that of the execution of the writ, the declaration should have averred on what day it was so executed, and that the bail-bond declared on was taken on that day. [*Bayley* B. As the sheriff must be taken to know on what day he made the arrest, the declaration need not aver it.]

BAYLEY B.—The act for uniformity of process, 2 *Will.* 4. c. 39. requires in its form of a writ of *capias*, Schedule No. 4., that special bail shall be put in by a defendant within eight days *after the execution on him* of that writ, *inclusive of the day of such execution*. The bail-bond in question is conditioned for putting in special bail in this court to the action within the space of eight days *from the date of the bond, inclusive of the day of such date*, according to the form and practice of this court. It was shown not only to bear date on the day on which the writ was executed by the arrest of *Summers*, but also to have borne that date on that day. Then if the condition of the bail-bond in question does not in terms correspond with the enactment of 2 *Will.* 4. c. 39. it does so in substance; and as that

later act has enlarged the "day to be kept" by the defendant, by giving him a different day for the filing special bail, the previous enactments of 23 *Hen. 6. c. 9.* apply to the new day so provided. These rules must therefore be discharged.

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The other Barons concurring,

### Rules discharged. (a)

(a) See *Hillary v. Rowles*, 5 B. & Adol. 460 ; *Thompson v. Dicus*, ante, Vol. III. 873.

### EDMUNDS *against* DOWNES.

**A**SSUMPSIT by payee against maker of a promissory note of the defendant, dated 15th *January* 1817. Plea: the general issue and the statute of limitations. At the trial before *Gurney B.*, at the last summer assizes for *Shropshire*, it appeared that the plaintiff was one of the executors of his father, who bequeathed the residue of his personalty among his children, among whom was the defendant's wife. The defendant being indebted to the testator at the time of his death in a sum considerably exceeding his wife's share, he and his wife signed a receipt for the amount of such share, and the defendant gave the plaintiff the promissory note in question in part of the balance due from him to the executors. The plaintiff took this note as part of his own share of the testator's residue.

In order to take a case out of the statute of limitations, a letter from defendant to plaintiff was put in, in which were the following words: "I shall be most happy to pay you both interest and principal as soon as convenient;" and in a subsequent part "I shall pay no more interest till we have a fair settling." Other letters of the defendant ac-

knowledged a debt, but spoke of a settling between him and the plaintiff.

Held, that in order to enable the plaintiff to recover, some evidence must be given that a time had arrived when it was convenient to the defendant to pay; and *semble* also that the settlement alluded to had taken place between the parties.

Whether the date of an acknowledgment of debt made in writing pursuant to 9 G. 4. c. 14. s. 1. can be proved by extrinsic oral evidence, *quære*.

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Interest had been paid on it down to 6th *March* 1826. In order to take the case out of the statute of limitations, it was shown that in answer to repeated applications for payment made subsequently to the last payment of interest, the defendant sent the plaintiff a letter without a date, of which the following is an extract:

"I shall be most happy to pay you both interest and principal as soon as convenient. I believe the greatest part of what I received from your father has been returned amongst the family, and it is high time the executors had brought the business to a conclusion. Such lawyers as they employ will perhaps eat up the principal and interest. Surely the day is not far distant when a final settling may be expected; you are all pretty punctual in asking me for interest, but never say a word about allowing interest for the remainder of the money due from the share money of your late father. I shall pay no more interest till we have a fair settling. Should you ever have occasion to write to me again, you may direct to me in a very different way from what you do. Esquire would suit a great man like yourself much better than an humble individual like me, who has not paid interest which you say was due on the 6th of *March* last. Still your well wisher,

*Wednesday evening.*

*Thomas Downes,*  
but no esquire."

The time at which this letter was delivered to the plaintiff was spoken to as having been in *December* 1827 by his brother, who said he remembered having then brought it from the defendant by a festive occasion on which he then went to the plaintiff's house; but the precise time did not appear to be satisfactorily established. In the spring of 1829 the defendant met *Humphreys*, another brother-in-law of his, who applied to him for

money due from defendant to him. Defendant said "I have no money, but I am short of stock and have plenty of grass, and if you like you may send stock to my grass to eat up the debt. And I also owe *John Edmunds* (meaning the plaintiff) a debt, and when you see him you may tell him that I will do the same with him towards paying him what I owe him." Mr. *Humphreys* declined this offer, but in a few days afterwards communicated it to plaintiff, who accepted it and bought several head of cattle and sent them to the defendant's grass for the purpose of liquidating the debt, where they remained for about a month, when, in consequence of losing one by defendant's mismanagement, the plaintiff sent for the rest away, and applied through his attorney for an account of the defendant's charge for the cattle which had been in his grass, and for payment of the balance due to the plaintiff after deducting such account; to which application the plaintiff's attorney received the following answer from the defendant, dated *August 26th, 1829*.

"Sir,—I will thank you to tell Mr. *John Edmunds* (the plaintiff) that I shall not send my account till he gives an account of his stewardship. I am happy to find that that long-protracted business is likely to be brought to a conclusion. I hope it will prove to the satisfaction of all parties. As soon as I have done my harvest I will look out for a proper person to examine Mr. *Edmunds's* accounts. I shall not have time before, although I want money bad enough." Signed by the defendant.

The defendant wrote the following letter to the plaintiff in answer to one from plaintiff applying for the debt, dated 1st *April 1832*:—

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"Sir,—As to money, I have only to say that I have none to spare, neither do I think you can reasonably expect any from me, till you have satisfied me that you have not a good deal to pay me out of your late father's effects; when your accounts are properly looked over by a competent person, if anything is really due from me to you, you may rely upon having it the first convenient opportunity, but I will not again ruin myself by selling my stock and taking in other people's to consume the produce of the farm "

The defendant's counsel contended, first, that as no date appeared on the first letter, it was impossible to say to what 6th *March* its last line applied, and that it was not therefore a sufficient acknowledgment in writing within 9 *Geo. 4. c. 14.*, and that the date could not be supplied by oral evidence. Secondly, that if it could, and the written acknowledgment was sufficient, it did not contain an express promise to pay, but a promise to pay when convenient, of which convenience or ability to pay no evidence was given; *Tanner v. Smart* (a). The plaintiff having had a verdict subject to a motion for a new trial on the above points,

*Jervis* in *Michaelmas* term last, moved accordingly; and Lord *Lyndhurst* having asked whether a promise to pay as soon as convenient, or at the first convenient opportunity, did not import a promise to pay in a reasonable time, a rule was granted; against which

*Talfourd* Serjt. now showed cause. As to the first point, it was held in *Lechmere and Others v. Fletcher* (b), that a promise to pay the defendant's proportion of a debt due to the plaintiff from himself and another, made in writing more than six years after the original

(a) 6 B. &amp; Cr. 603.

(b) *Ante*, Vol. III. 430.

transaction, but within six years before the action brought, was sufficient within 9 *Geo. 4. c. 14. s. 1.*, though it did not express the amount of the debt; and extrinsic evidence was held properly admitted to prove that amount; à fortiori, it was competent for this plaintiff to supply the date of this letter in a similar manner. But 9 *Geo. 4. c. 14.* does not require that the time at which the acknowledgment was written shall appear on the face of it. To hold that it must, would be gratuitously to engraft a new condition on the statute. All that it does require is an acknowledgment in writing signed by the party chargeable thereby within six years. That has been proved. Can it be argued that oral evidence cannot be received since that act, when, before it passed, if a letter was given in evidence to take a case out of the statute of limitations, the post mark might be received as evidence of the time when it was in the post office, whose mark it bears? (a) So the water-mark on the letter would be evidence when the paper was made. [*Bayley B.* Actual payment of part may still be proved by oral evidence, so as to take a case out of 9 *Geo. 4. c. 14. (b)*] The testimony of the witness called to prove the fact when the letter was delivered, was of a higher kind than a written date, which might have been improperly introduced on the document at a wrong time. [*Bayley B.* The admissibility of evidence cannot be decided by the strength of it.]

On the second point, the defendant's expressing that he should be most happy to pay the plaintiff both principal and interest as soon as *convenient*, cannot be construed to be a conditional promise to pay. Ability to pay

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(a) See the cases 2 *Stark. on Ev. 2d edit. 456.*

(b) But a verbal acknowledgment of having paid part of a debt within six years will not be admissible since that act; *Willis v. Newham*, 3 *Y. & J.* 518; see *Haydon v. Williams*, 7 *Bingh. 163.*

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may co-exist with inconvenience in so doing ; *e.g.* when parties meet, when another account is settled, &c. In *Tanner v. Smart* (a), the defendant's acknowledgment was in these terms : " I cannot pay the debt at present, but I will pay it as soon as I can." Those words implied non-ability to pay at the time, and the promise was therefore held conditional merely, throwing on the plaintiff the onus of proving the defendant's ability to pay. But a promise to pay when convenient refers to another time for payment, without implying want of means to pay at the time. In *Tanner v. Smart* the main question was, whether an acknowledgment of debt was sufficient without a promise to pay. Lord *Tenterden* says (p. 609), " Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied ; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule *expressum facit cessare tacitum* apply?" But no such expression is found in this case, unless the words above stated, or those respecting payment 'on the first *convenient* opportunity' have that force. He also mentioned *Whippy and another v. Hillary* (b).

*Jervis* and *Whateley* in support of the rule. The court will not suffer the material fact of date to be imported by oral evidence into the letter relied on by the plaintiff as an acknowledgment. Nor is that letter *ex vi terminorum* applicable to the particular debt sought to be recovered. On proceeding to argue the second point, they were stopped by the court.

BAYLEY B. (c).—The defendant's words in his letter

(a) 6 B. & C. 603.

(b) 3 B. & Adol. 399.

(c) Lord Lyndhurst C. B. was sitting in equity.

to the plaintiff, "I shall be most happy to pay you both interest and principal *as soon as convenient*," appear to us to imply that it was not convenient to the defendant to pay at the then present time. We are therefore of opinion, that some evidence should have been given by the plaintiff that the time of such convenience had arrived, and perhaps that some settlement between the parties had taken place; for in a subsequent part of his letter the defendant says, "I shall pay no more interest until we have a fair settling." The same settling is pointed at in his letter of 1st April 1832. We do not give any express opinion on the first point, though we should not have made this rule absolute on the second, had we not thought it at least doubtful whether the date of the written acknowledgment could be supplied by oral evidence. My present opinion however is, that the first letter put in does contain as much on the face of it as by 9 Geo. 4. c. 14. was necessary to be expressed in writing. *Kennett v. Milbank* was cited in *Lechmere v. Fletcher* (a); but this court was of opinion with Lord Tenterden in the subsequent case of *Dickinson v. Hatfield* (b), that as the act did not require the amount of the debt to be specified in the written acknowledgment of it, that fact might be supplied by extrinsic evidence.

Rule absolute on the second point.

(a) 8 Bingham. 38.

(b) 2 Mood. & M. 141.

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A person in insolvent circumstances agreed with an attorney, who was one of his creditors and held a cognovit for his debt, to procure and conduct his discharge under the insolvent debtors' act, and that the debt should be omitted from the schedule, and the operation of the cognovit suspended till after the discharge had taken place, when it was to be revived. After the party's discharge, a judgment was entered up and execution issued. The court set them aside with costs.

**KELLY** had obtained a rule calling on the plaintiff to show cause why the judgment entered up against the defendant on a cognovit, and the execution issued thereon, should not be set aside for irregularity with costs. The defendant being indebted to the plaintiff among others, employed him as an attorney of the insolvent debtors' court to procure and conduct his discharge therein; but it was stipulated between them that the debt then due to the plaintiff should be omitted from the schedule, and that the operation of a cognovit then held by him for the amount should be suspended until after the defendant should be discharged, but should be revived immediately after that event. The defendant was afterwards discharged, and the plaintiff's bill for obtaining that discharge was satisfied. In a short time after, the plaintiff entered up the judgment and issued the execution now sought to be set aside.

*Pollett* showed cause. To support this rule there must be proof of actual fraud committed by the plaintiff; *Howard v. Bartolozzi* (a). The omission of the plaintiff's debt was no fraud on the insolvent debtors' court, for no creditor is bound to come in. Nor is it a fraud on the other creditors who by such omission obtained a larger present share of the insolvent's effects. In *Jackson v. Davison* (b), and *Carpenter v. White* (c), which will be cited on the other side, the plaintiffs had been opposing creditors. Those cases were so distinguished by *Denman C. J.* and *Parke J.* in *Howard v. Bartolozzi*. If the body of creditors are

(a) 4 B. &amp; Adol. 555.

(c) 3 B. Moore, 231.

(b) 4 B. &amp; Ald. 691.

unaffected, and the parties are the only persons interested in omitting the name and debt from the schedule, there seems no objection to so doing. Again, in *Howard v. Bartolozzi*, it was not considered a fraud on the general policy of the insolvent law that an attorney employed by a party about to take the benefit of an insolvent act should omit from the schedule a debt due to himself, and sue the party for it after her discharge (a). In *Baker v. Sydee* (b) the defendant, at the time of becoming insolvent, disputed the plaintiff's right to recover in the action, and did not include him in his notice or schedule. The court of C. P. held, that the notice was only notice to the creditors named in the schedule and notice, and that his discharge was against the demands of such creditors only. That decision took place on 53 Geo. 3. c. 102. s. 32., with which 7 Geo. 4. c. 57. s. 61. in substance corresponds. By section 46 of the latter act, the insolvent court is to adjudge that the prisoner be discharged and entitled to the benefit of the act "as to the several debts and sums of money due or claimed to be due at the filing the prisoner's petition from such prisoner to *the several persons named in the schedule as creditors*, or claiming to be creditors for the same respectively" &c. That shows that a creditor who does not come in under the insolvent act is not bound by it, and that an action is maintainable against an insolvent after his discharge, if the cause of action is not contained in his schedule.

*Kelly* contra. The agreement sought to be enforced in this action is a fraud on the insolvent court, on the other creditors, and on the policy of the insolvent law. First, the plaintiff, who, being a creditor of defendant,

(a) At the time of that decision it was doubtful on the evidence whether *Howard* had wilfully, fraudulently, and in breach of his duty to the defendant, concealed his debt or prevented her from inserting it in her schedule.

(b) ? Taunt. 179.

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was employed as his attorney to procure his discharge, must be taken to have prepared the schedule and purposely to have omitted his own debt. The effect of the agreement was, that the insolvent should consent to a false schedule being made, and so deceive the insolvent court. For by 7 G. 4. c. 57. s. 40., the debtor is to deliver in on oath a schedule containing "a full and true description of all debts due or growing due from such prisoner at the time of filing his petition, and of all and every person and persons to whom such prisoner shall be indebted, or who to his or her knowledge shall claim to be his or her creditors, together with the nature and amount of such debts and claims respectively." And by section 43. at the hearing the matters of such petition and schedule, the court is to examine into the matters thereof *upon the oath* of such prisoner, and of such parties and other witnesses as they shall think fit to examine. Neither of these sections were brought before the court in *Howard v. Bartolozzi*. Next, the creditors are defrauded; for by section 57. means are pointed out by which the assignee may obtain execution to issue in order to distribute the insolvent's after-acquired property among his creditors; but if a single creditor can by such an agreement as this withhold his debt from the schedule, and immediately after the discharge enter up judgment on a cognovit previously given, he may gain a priority of execution so as to pay his whole debt with the debtor's after-acquired property, to the prejudice of the other creditors. Lastly, it is a clear fraud on the policy of the law which intended the complete discharge of the debtor's person from all his debts previously contracted, and the application of all his effects future as well as present to the rateable payment of them.

BAYLEY B.—I am of opinion that this judgment and

execution should not be permitted to stand. When *Tabram* was employed to obtain the defendant's discharge, it became his duty to state in his schedule all the defendant's debts, including that owing to himself, according to section 40. The effect of so doing might be to call into operation the opposition of every creditor against whom the discharge to be subsequently obtained would operate, and to exonerate the estate from the claims of any person who might have come in and claimed for a debt incurred previously to the insolvent's discharge. The plaintiff, by agreeing that a schedule omitting his own debt should be delivered in under the statute, agreed in fact that the insolvent should deceive the insolvent court by a wilfully false statement on oath, contrary to sections 43 and 71 of the insolvent debtors' act. This would alone be sufficient to avoid the agreement; but the creditors are also imposed on. They have a right to believe that the debtor is set free, and that by his future exertions he may procure the means of supporting himself and satisfying their just claims. How can he do this if his person and his property are liable to an execution whenever after his discharge the plaintiff may find it advantageous to come upon him? The true scope and object of the statute appears to have been but partially considered in the case of *Howard v. Bartolonzi*. Its intent was, that insolvents should lay before their creditors and the court a fair and true statement of their affairs, in order that where they have been guilty of no misconduct their persons should be discharged and their property divided among their creditors; and that when discharged they should be unincumbered with prior obligations and free to seek their livelihood, subject to the right of the creditors to their future surplus money. All these objects might be defeated if agreements like the present could be

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supported in law. The rule for setting aside the judgment and execution must be made absolute with costs, which will leave the plaintiff at liberty to try the question in an action, and carry it into a court of error, if he thinks fit.

VIRGIL B.—Considering sections 40, 60, and 63 together, this affair appears very like a fraud on the insolvent act. Section 63 provides, that where amounts are erroneously stated in schedules without fraud, creditors and insolvents may enjoy the benefit of the act, notwithstanding; but the act is wholly silent as to the total exclusion of a particular debt by preconcert or otherwise. It has been shown how such an agreement as this would affect the rights of the other creditors.

BOLLAND B.—Suppose an insolvent to set forth debts to a trifling amount on his schedule, he might again obtain credit and goods on the ground of being cleared of all his debts. But if an old creditor can be permitted to keep back his debt to a large amount, he might sweep away the goods thus obtained on new credit.

GURNEY B.—The directions of section 40 are precise. Now as the plaintiff was employed by the insolvent as the attorney to procure his discharge, he must be responsible for the contents of the schedule, and the omissions from it. Section 32. prevents voluntary assignments of property by insolvents to their creditors within three months before the insolvent's imprisonment. This agreement having been contrived by the plaintiff cannot be enforced by him for his own benefit. It is a fraud on the law, the court, and the creditors, and an oppression on the debtor.

Rule absolute for setting aside the judgment and execution with costs.

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DOE on the demises of J. H. HARRIES, W. EDWARDES,
C. TUCKER, and J. SYMMONS, *against* MORSE.

EJECTMENT for a farm called *St. Dogwell's* in *Pembrokeshire*. At the trial before *Patteson J.* at the spring assizes for that county in 1833, the question was as to the validity of a lease granted by *J. O. Edwardes*, the father of one of the lessors of the plaintiff, under the leasing power, in the following settlement.

By indentures of lease and release of 4th and 5th *August 1777*, the release made between *Rowland Edwardes* the elder and *Ann* his wife, of the first part ; *J. O. Edwardes* eldest son and heir at law of the said *R. E.* of the second part ; *W. Ford* and *J. Harries* of the third part ; *J. Symmons* and *G. Harries* esqrs. of the fourth part ; and *Catherine Tucker*, spinster, of the fifth part. After reciting that a marriage was intended to be solemnized between the said *J. O. Edwardes* and *Catherine Tucker*, and that by certain conveyances the lands and hereditaments thereafter described were thereby limited, in default of a certain appointment, to the use of the said *R. E.* for life, and of the said *J. O. E.* his heirs and assigns for ever, it was witnessed, that in consideration of the said intended

By a leasing power in a marriage settlement, dated 5th *August 1777*, power was reserved to the persons in actual possession, by virtue of its limitations, to lease any part of the lands thereby settled in strict settlement "for one, two, or three life or lives, or any term or number of years not exceeding 21, so as upon all and every such lease or leases there should be reserved and continued payable, during the respective continuance of such lease and leases, by half-yearly payments, the best

and most improved yearly rents that could be reasonably had or obtained, without taking any sum or sums of money or other thing by way of fine or income for the same." By lease of 11th *January 1783*, the tenant for life of the settled property (one of the creators of the power) demised a part of it to hold from the 4th *January* preceding for three lives, *reddendum* the yearly rent or sum of 31*l.* 10*s.*, at or upon the two most usual feasts or days of payment in the year, viz., the feast of *St. Philip and St. James the Apostles* (1st *May*), and *St. Michael the Archangel* (29th *September*), by even and equal portions; the first payment to be made on the feast of *St. Philip and St. James the Apostles*, next ensuing the date of the lease: Held, first, that the lease was void, the power not having been duly executed by reserving the rent at half-yearly periods ;—secondly, that old leases of other lands in the neighbourhood were not admissible to show the above feast days to be the usual half-yearly days of payment in that part of the country.

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marriage, they the said *R. E.*, *A.* his wife, and *J. O. E.*, did grant, bargain, sell, alien, remise, release and confirm, limit and appoint, unto the said *W. Ford* and *J. Harries*, and their heirs and assigns (inter alia) the premises in question, situate &c., and then or there late in the tenure or occupation of *M. Adam*, to hold the same unto and to the use of the said *W. Ford* and *J. Harries*, their heirs and assigns, for ever. To the use of the said *R. E.* party thereto, and his heirs, until the solemnization of the said intended marriage; and from and after the solemnization of the same, to the use of the said *R. E.* party thereto, for and during the term of his natural life. Remainder to the use of the said *J. O. E.* and his assigns, for and during the term of his natural life; remainder to the use of the said *W. Ford* and *J. Harries* and their heirs, during the lives of the said *R. Edwardes* and *J. O. E.*, upon trust to preserve contingent remainders; remainders to the use of *J. Symmons* and *G. Harries (a)*, their executors, administrators and assigns, for 500 years from thence next ensuing, upon the trusts thereafter expressed; remainder to the use of the first son of the marriage, and the heirs of the body of such first son lawfully issuing, with divers remainders over. Proviso that it should and might be lawful for all and every the person and persons being in the actual possession of all or any part or parts of the said premises thereby granted and released and appointed by virtue of the limitations aforesaid, by any deed or deeds indented under their hands and seals respectively to be executed from time to time, to make any lease and leases in possession and not in reversion or remainder, or by way of future interest, of all or any of the same premises, or of any part or parts thereof whereof such person should

(a) *J. Symmons* survived *G. Harries*, and *J. H. Harries*, the lessor of the plaintiff, was heir of *J. Harries*, who survived *W. Ford*.

be in possession, unto any person or persons, for one, two, or three life and lives, or any term or number of years not exceeding 21 years, so as such lease or leases, by any express words therein to be contained, be made not dispunishable of waste; *and so as upon all and every such lease and leases there should be reserved and continued payable, during the respective continuance of such lease and leases, by half-yearly payments, the best and most improved yearly rents that could be reasonably had or obtained, without taking any sum or sums of money or other thing by way of fine or income for the same.* And so as in every such lease there should be contained a clause of re-entry for non-payment of the rent and rents to be thereby reserved: and so as the lessee or lessees to whom such leases should be made as aforesaid, should seal and deliver a counterpart or counterparts of such lease and leases respectively, to be made as aforesaid.

The marriage took place shortly after the settlement, and *R. Edwardes* soon afterwards died, leaving the said *J. O. Edwardes* him surviving. By indenture of 11th *January* 1783, between the said *J. O. Edwardes* of the one part, and *M. Adams* of the other part, it was witnessed, that the said *J. O. Edwardes*, for and *in consideration of the surrender of a former lease* theretofore granted on the premises thereafter demised; and also for and in consideration of the rents, covenants, and agreements thereafter reserved and contained, which, on the part of the said *M. Adams*, his heirs and assigns, were to be paid, performed, and kept; and for divers other good causes and valuable considerations him the said *J. O. Edwardes* thereunto especially moving, did demise, grant, set, and to farm let unto the said *Morris*, his heirs and assigns, the premises in question, then in the occupation of him the said *M. Adams*, his undertenants and assigns; together

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with all houses &c. (in as large and ample a manner as *R. Adams*, father of the said *M. Adams*, and his under-tenants, formerly held and enjoyed the same,) except all mines, &c : to hold the said premises with the appurtenances, except as aforesaid, unto the said *M. Adams*, his heirs and assigns, from the 4th day of *January* then instant, for and during the natural lives of *E. A.*, *J. A.* and *A. Adams*, daughters of the said *M. Adams* and *M.* his wife, and for and during the natural life of the survivor or longest liver of them; yielding and paying therefore yearly and every year, during the said term, unto the said *J. O. Edwardes*, his heirs and assigns, the yearly rent or sum of 31*l.* 10*s.*, at or upon the two most usual feasts or days of payment in the year, (that is to say) the feast of *St. Phillip and Jacob the Apostles* (a), and *St. Michael the Archangel* (b), by even and equal portions, the first of such payments to begin and be made on the feast of *St. Philip and Jacob the Apostles* next ensuing the date thereof. And also five couple of young fat hens at *Shrovetide* yearly, and carrying or causing to be carried three cart-loads of coal or culm from the coal or culm pits to the dwelling-house of either *Hook* or *Sealeyham* yearly; and also grinding and doing suit with all his and their and every of their corn, grist, grain and malt, at the first mill, called *Treffgarne* mill, during the said term, and keeping one dog, either hound, greyhound, or spaniel, in good sporting order for the said *J. O. Edwardes*, his heirs and assigns. And also paying and discharging yearly, during the said term, the chief rent called the *Bishop's* rent for the said premises. Then followed covenants for the above objects as stated in the redendum, with a proviso of re-entry in case the said rent should be unpaid by the space of 21 days next after either of the said days of payment whereon the same

(a) May 1st.

(b) September 29th.

ought to be paid as aforesaid being lawfully demanded, and no sufficient distress or distresses to be had or found on the said demised premises to satisfy the same, together with all arrears thereof, if any, or non-performance of the costs and agreements therein contained. The lessor *J. O. Edwardes* died in *July* 1825, leaving *W. E. Tucker* a lessor of the plaintiff, his heir at law, as eldest son of the marriage, him surviving. The defendant was assignee of the lease. For the lessors of the plaintiff it was contended that the lease was void, for the following reasons :


1. The power having required the reservation of the best yearly rent by half-yearly payments, without taking any sum or other thing by way of fine or income, the lease took effect from the 4th *January* preceding its date, and fixed the first payment of rent for 1st *May*, a period of four months only, and the second for 29th *September*, another period of about five months only. The lease reserved the rent not by half-yearly payments as in the power, but by payments on 1st *May* and 29th *September* in each year, which are not half years. The first payment of rent reserved to be made on 1st *May* 1783, within six months, made it a forehand rent, and tantamount to taking a fine.

2. That if the duties and customs were reservations of rent, they should have been reserved half-yearly ; and that if they are not reservations of rent, they are in the nature of a fine or income, and contrary to the power which directed the best yearly rent to be reserved.

3. That the clause of re-entry should have been immediate on non-payment of the rent or non-performance of the covenants, without postponing the period, or being clogged with any condition as to sufficient distress on the premises (a).

(a) Sec 2 Br. & B. 524.

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For the defendant it was answered, 1st, that the power did not require equal half-yearly payments of rent, but that yearly rent should be reserved during the continuance of a lease by half-yearly payments. That what are to be considered days for half-yearly payments of rent depends in every case upon usage, the intervals between every usual day, as *Lady-day* and *Michaelmas*, *Christmas* and *Midsummer*, being different. That evidence was therefore admissible, to shew the 1st *May* and 29th *Sept.* to be the most usual half-yearly rent-days in that neighbourhood and to be so described in leases. Leases of lands of other deceased persons in various parts of *Pembrokeshire*, dated about the same period as the leases in question, and in which these days were fixed for payment of rent, were tendered to shew the usage. 2d. That the duties were neither reservations of rent nor fines. 3d. That the condition of re-entry, being in the terms usually adopted and reasonable in itself, satisfied the general wording of the power.

The learned judge held that proof of any usage in the neighbourhood by which rents were reserved payable on the days in question might be received, and cited *Smith and another v. Wilson* (a); but held that the leases offered in evidence for that purpose were inadmissible. He inclined to think that the reservation of rent on two known feast days might be considered a half-yearly reservation within the power, and that *Doe d. Lord Shrewsbury v. Wilson* (b) was in point for the defendant, on the objection that the first rent being made payable at a day within the first six months was therefore a *forehand* rent. Also, that the reservation of the fowls was not a "fine," and that the clause of re-entry was good,

(a) 3 B. & Adol. 728.

(b) 5 B. & Ald. 363.

the words of the power being general, *Doe d. Jersey v. Smith*(a); and lastly, that the lease was a due execution of the power. He accordingly nonsuited, giving leave to move on all the points to enter a verdict for the lessors of the plaintiff. A rule was accordingly obtained in *Easter* term.

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J. Wilson, J. Evans and *E. V. Williams* showed cause in *Trinity* term. The validity of this lease depends on whether or not it is a defective execution of the leasing power. It may be briefly premised, that the doctrine of giving a stricter interpretation to such powers than to any other(b) is long exploded, and that it is held that being for the benefit of all parties to the estate and a common modification of property in land, they are to be literally construed and carried into effect according to the intention of their authors(c). The first and main objection to the lease is, that whereas by the terms of the power the rent is to be payable by half-yearly payments, it is in fact made payable by the lease at two intervals, the one less, the other more than half a year. The parties creating the power cannot be taken to have intended a literal performance of this direction, as a year cannot be divided into an equal number of days(d). In *Harrington v. Wise*(e), the lease was for years, rendering rent at the "two usual feasts del an" which the court held to be *Michaelmas* and *Lady-*

(a) 5 B. & Ald. 363. (b) See id.; 2 Br. & B. 473; Doug. 565.

(c) *Foot v. Marriott and others*, MS. Rep. Pasch. 13 Geo. in Canc. 3 Vin. Ab. 431; 1 Burr. 121; 3 Chs. R. 73. See *Shannon v. Bradstreet*, 1 Sch. & Lefr. 52. cor. Lord Redensdale; *Right v. Thomas*, 3 Burr. 1446; *Goodtitle v. Furness*, Doug. 573; and Bla. R. 440; *Pomeroy v. Partington*, 3 T. R. 675; see also the *Jersey case*, 1 Br. & B. 97; 2 id. 472; and Sugden on Powers, 5th edit. 387, 383.

(d) See Co. Lit. 133 b.

(e) 2 Roll. Abr. 480, tit. Reservation, M. pl. 2.

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day(a), but it could only be by usage that payments of rent on those days could be considered half-yearly payments, as neither interval amounts precisely to half a year; thus the period between *Michaelmas* and *Lady-day* contains 177 days, and that between *Lady-day* and *Michaelmas*, 188. Again, the interval between *Christmas* and *Midsummer* contains 181 days, and between *Midsummer* and *Christmas*, 184; yet they are commonly called half years, and rents are reserved accordingly. Nor does the payment of half-yearly dividends approach more closely to the 182 days mentioned by *Coke* as half a year(*b*). But *E. O. Edwardes*, in creating the power, considered 1st *May* and 29th *September* to be the days usual for payment of half-yearly rents, and if so, the inaccurate effect must be given to his opinion. The lease in question, being subsequently granted by him, best proves the sense in which he had used "half-yearly" in the power. [Lord *Lyndhurst*. Can the construction put on a power by the author of it in a subsequent lease be taken to illustrate its meaning?] Had the lease reserved rent "at the two most usual feast days," that would have been sufficient within the power; and which days they are depends on the

(a) *May-day* and *Martinmas* were said to be usual half-year days in the north; *Candlemas*, 2d *February*, and *Lammas*, 1st *August*, were mentioned by Lord *Lyndhurst* as more closely corresponding in the length of the intervening periods.

(b) As to the *tempus semestris*, see *Catesby's case*, 6 Rep. 61; Cro. Jac. 167. Lord *Coke* says, Co. Lit. 135 b., A quarter of a year containeth by legal computation ninety-one days, and half a year containeth 182 days; (viz. the solar year, Bract. 359,) for the odd hours (viz. the six hours over the 365 days in each year which is the minor year, viz. not the bissextile or leap-year consisting of 366 days) in legal computation are rejected, and by the statute, *de anno bissextili*, 21 Hen. 8. it is provided *quod computentur dies ille excrecens et dies proximè precedens pro unico die*, so as in computation that day excrecent is not accounted. The first six calendar months of the year includes *February* and contain 180 days only, the other six 184 days.

custom of the country. Extrinsic circumstances, as the intent to use a word in a sense different from its usual or correct acceptation, may be considered in construing a power(a). The meaning of "half-yearly" as here relied on, in opposition to the lease, is, to use Sir *Thomas Plumer's* words in *Cholmondeley v. Clinton*(b), "an imported meaning, not the result of the words themselves but of superadded inference. The additional idea suggested by inference, originates not with the writer but his expositor, and being collected extrinsically by conjecture, may by extrinsic circumstances be rebutted. Take a familiar instance in the construction of the words 'the true religion;' the expositor interprets them to mean the christian religion, but would he persevere in that construction when he discovered the words to have come from a Mahommedan? Do the words change their meaning when that circumstance is discovered? No; but the erroneous inference of the expositor does; and so it is in the present case." Here the term "half-yearly" being equivocal, not admitting of a strict or arithmetical acceptation, extrinsic evidence, *e. g.* usage, must be let in to explain it(c). In *Smith and another v. Wilson*(d), cited by the learned judge at the trial, the lessee of a warren had covenanted that at the expiration of the term he would leave on the warren 10,000 rabbits, the lessor paying for them 60*l.* a thousand, and in an action against the lessor for refusing to pay for the rabbits left at the end of the term, parol evidence was held admissible to shew that by the custom of the country where the warren was, the word "thousand," as applied to rabbits, denoted 100 dozen or 1200 rabbits. Arithmetical construction being out of the question in this case, the reasonable construction is more necessary, viz. that the

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(a) See 2 Jac. & W. 91—93.

(b) Id. 121.

(c) See *Doe v. Meyrick*, ante, Vol. III. 901, 902.

(d) 3 B. & Adol. 728.

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power is satisfied by there being two equal payments in the year at reasonable intervals, the most cogent evidence that they are reasonable, being the usage of the country where the land was. In *Cowdrey's* case (a), a party seised of lands devised to R. C. "60s. of yearly rent growing out of all his lands in H." with a claim of distress for non-payment thereof "at the usual feasts" during his life. The usual feasts in these villis were *St. Michael* and the *Annunciation* (viz. *Lady-day*), and the rent being in arrear at the feast of *St. Michael* the devisee distrained and held good, for the usual days shall be taken to be the usual days for payment of rent in the place where the lands were. Then the ancient leases of other estates in the neighbourhood, stating the days in question to be the usual and accustomed days of payment, should have been received in evidence. [Lord *Lyndhurst*. In the case cited, evidence was clearly admissible to explain the word "usual," but have the words "yearly" or "half-yearly" such a patent ambiguity as would entitle you to explain them by evidence extrinsic to the deed? Leases of other estates in the county were *res inter alios*, and therefore not admissible.] It is clear that *M. Adams* was in possession by a former lease, and it may be inferred that the rents were therein reserved on the same days. In *Cholmondeley v. Clinton*, it being shown by the deed of 1781, that Lord *Orford* knew himself to be the right heir of *Samuel Rolle* at the time he settled the estates in question to the use of himself for life, and from and after his decease, in default of heirs of his body or other appointment by himself, to the use of the *right heirs* of *Samuel Rolle* for ever; Mr. Justice *Bayley* and Sir *Thomas Plumer* Master of the Rolls came to the conclusion that he intended by those words Mr. *Trefusis* the right heir of *S. Rolle* at his own, Lord *Orford's*

(a) 2 Anderson, 122, pl. 67.

death(a). [*Bayley B.* The defendant was excluded not from adducing testimony of what the usage was as to the general or ordinary days of reservation of rent in the neighbourhood, but from giving in evidence leases, the terms of which were settled among other parties. Lord *Lyndhurst*. If leases selected as containing reservations of rent on the days for which you contend had been admitted in evidence, how could they have been met by the other side? By producing other leases in which rent was reserved on other days, also recited to be usual days of payment?] When it is said that certain feast days for payment of rent are recognized by the law, the custom of the country where the lands are is thereby recognized. Thus had *Lady-day* and *Michaelmas* been reserved (which would have raised nearly the same question as the present), it would have been said that they were not to be the usual rent days in that part of *Wales*.

The next objection is, that the first payment of rent being reserved for four months only, *viz.* being payable on 1st *May* 1783, the habendum being from 4th *January*, is a forehand rent, and tantamount to taking a fine for granting the leases contrary to the terms of the power, which also directs that the best rent should be reserved. But the lease shews an antecedent occupation of the premises by the lessee under a former lease, the surrender of which was the consideration for granting the present. Then as no fraud can be presumed, the inference is, that the first rent was so reserved for an anterior occupation. *Isherwood v. Oldknow* (b) is directly in point as to this objection. The power in that case was to make leases for two or three lives or for the term of twenty-one years, so as there were reserved, payable during the continuance of each lease, the best and most improved yearly rents which, at the time of making such lease, could be

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(a) See 2 B. & Ald. 641; 2 J. & W. 1.

(b) 3 M. & S. 382, 393.

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gotten for the same, without taking any sum or sums of money, or other thing, for or in lieu of a fine or income for the same. By lease, dated 15th *October* 1800, the tenant for life let the premises for fourteen years, to be computed, as to the meadow and plough-land, from 13th *February* then last, as to the pasture lands from 25th *March*, also then last, and the messuage &c. from the 12th *May* then last, at a yearly rent, payable to the lessor and such other person as for the time being should be entitled to the freehold and inheritance, by half-yearly payments on 11th *November* and 25th *March*, "the first payment to be made on 11th *November* next ensuing." And it was held, that the reservation of the first half-year's rent, for an enjoyment of only twenty-seven days was not taking a sum of money for a fine, being a compensation taken in consideration of an occupation antecedent to the date of the lease. And Lord *Ellenborough* said, "how is that (the reservation of the first half-year's rent) a breach of the condition? is it taking a sum or sums of money for or in lieu of a fine? it is at the utmost but granting a lease with a covenant for payment of the first half-year's rent before the half year has expired. It is then at the utmost only taking a covenant which may be the means of possibly acquiring to him a sum of money. Then it is not within the letter, but is it within the spirit? The power says, 'for or in lieu of a fine or income for the same;' is this for or in lieu of a fine or income? What fine did the party contemplate? The reservation appears to be in consideration of an antecedent occupation. It is not in lieu of a fine if a party take a compensation for a time antecedent to the date of the lease, during which time the lessee has been permitted to occupy, and considering the lease as if it were executed at the time of the commencement of the occupation." [Lord *Lyndhurst* C. B. There was no evidence to show how that *M.*

Adams held under the surrendered lease. If under that lease the rent was reserved payable at the same feast days, the rent would be running on; and it might perhaps be presumed that they were alike in both leases.] In *Doe d. Shrewsbury v. Wilson*(a), power was created by a private act of 1720, to lease for three lives or twenty-one years, or any term of years determinable on three lives, "so as upon all and every such lease and leases there be reserved and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, boons and services." The lease bore date 6th *January* 1785, reciting the surrender of a prior lease of the premises, and was for ninety-nine years, if three persons therein named should so long live, at a yearly rent payable at *Lady-day* and *Michaelmas*, the first payment to be made on 25th *March* 1785. A prior lease of the premises was in evidence dated 2d *February* 1708, with similar reservations of rent. It was objected that a half-year's rent having been reserved for the interval between 6th *January* and 25th *March* 1785, that was a forehand rent in fraud of the power, but the Court held it a "usual and accustomed rent" within the power. *Doe v. Giffard* (b) will be relied on for the other side, but the lease was there for twenty-one years, dated 14th *September* 1809, and reserved a rent payable by even half-yearly payments on 29th *September* and 25th *March*, the first payment to be made on 25th *March* then next. But the lease appears to have been held bad, on the ground, that as the last year of the term would end on the 14th *September* no rent would be payable at all after *Lady-day* of that year. The lease in that case, as well as *Doe v. Wilson*, being for a term

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(a) 5 B. & Ald. 363.

(b) At *Nisi Prius*, before Lord Ellenborough, 1810. Cited *arguendo* in *Doe v. Wilson*, 5 B. & Ald. 371.

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of years certain, the remainder-man could in no case be benefited, but must receive injury. Whereas in this, which is a lease for lives, the termination must inevitably be uncertain, and the remainder-man may be a gainer^(a). The dictum of *Powell J.* in *Regina v. Weston* ^(b), to which *Holt C. J.* agreed, is contrary to *Doe v. Giffard*. *Tomkins v. Pynsent* ^(c) shows that the words "if the feast of *St. Philip and St. James*, and *St. Michael the Archangel*" are not the usual half-yearly feasts, they might be rejected as repugnant even out of the instrument itself. [*Bayley B.* There the repugnancy was clear on the face of the instrument itself, the *reddendum* being by quarterly payments, and only three quarter days being afterwards named ^(d).]

Chilton and Whitcombe in support of the rule ^(e).

^(a) See Sugden on Powers, 5th edit. 630.

^(b) Lord Raym. 1198.

^(c) Id. 819.

^(d) No judgment was given on the other points which were thus argued.

For the defendants it was said, that if the money rent is the best and most improved yearly rent, and reserved at the proper half-yearly intervals, it is immaterial on what days the superfluous reservations are made to accrue. It will be said, that if these duties and services had not been reserved, the rent would have been so much larger; but in estimating whether a rent reserved fifty years ago was the best at that time, the scales will not be very nicely adjusted, and in the absence of all proof of fraud it will be taken to be a *bona fide* reservation at the time; *Doe v. Radcliff*, 10 East, 278. It does not appear whether lessor or lessee was liable to pay the bishop's rent, and the construction must be in favour of the lease *ut res magis valeat quam pereat*. *Doe d. Jersey v. Smith*, 2 Br. & B. 590—596, shows the clause of re-entry to be within the power.

For the lessor of the plaintiff it was contended, that if the other reservations of services &c. to be rendered were to be taken as part of the rent, then the whole rent was not reserved by half-yearly payments according to the power; if they were not, a better pecuniary rent might have been obtained had they not existed. Several of them, as carrying the curlew, keeping the dog, &c. might be of no possible benefit to the remainder-man. On the last point *Cox v. Day*, 13 East, 118, applies, and is not overruled by *Doe d. Jersey v. Smith*, 2 Br. & B. 472.

^(e) *Whitcombe* was heard in Michaelmas term 1833.

The first objection has been argued throughout as if the power had directed the yearly rent to be reserved payable on the usual feasts and not by half-yearly payments. Now *Cowdrey's* case in *Anderson*, besides the having arisen on a will, turns on the term "usual feasts;" whereas the power clearly requires the "best and most improved yearly rents to be reserved by half-yearly payments," and has no reference to usage or custom. It plainly requires a yearly rent, one half payable at the end of one half the year, the other at the end of the other. But it is said, that to bisect the year accurately is impossible; if so, and an impracticable thing was prescribed by the power, no lease would be valid: But *Harrington v. Wise* (a) shows that the law recognizes divisions of the year in respect of payment of rent, viz., *Michaelmas* and *Lady-day*. Those are usual and accustomed days, though unequal in point of interval, and a reservation of rent on them would be good. If the custom in a nook of the kingdom is to be set up against the general law, its existence as such must first be established by legal evidence. Not only has this lease not divided the year as near as possible, viz. by calendar months, *e. g.* *Old Candlemas* 2d *February*, and *Lammas* 1st *August*; but it has not divided it according to the usual rent days, or with any regard to fair proportion. A lessor bound by a power to reserve rent quarterly or half-yearly, must not go further from the arithmetical proportions than the usual quarter days recognized by the law, the largest disproportion between which is less than eleven days (b). The word "half-yearly" intends an equal division by 182 days, rejecting the odd hours, or by the half-year recognized by the law divisible by the usual quarterly feasts. Had extrinsic evidence established a peculiar usage in *Pembrokeshire* it would not have applied,

(a) 2 Rol. Ab. 450.

(b) See *ante*, 192.

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there being no reference to usage in this power. On the other hand, it contains an unambiguous direction to reserve the rent by half-yearly payments, dehors which the court cannot look. Notice might have been given to produce the former lease so as to let in evidence of the days at which rent had been there reserved. In 2 Rolle's Abridgment, tit. *Reservation*, M. pl. 3. is this dictum of Coke: "If a man lease land on the 1st of *May*, or at another time, payable quarterly, this shall be understood quarterly from the making of the lease and at the usual feasts. If, under the present power, the lease had reserved rent payable at *Midsummer* and *Michaelmas*, styling them the two most usual feast days for payment of rent in the year, those might equally be called half-yearly payments. The settlor's intention must rule, but can only be gathered from the power and not from his subsequent declarations (*e.g.* recitals in leases) in enlargement of his power. Though the termination of a freehold lease may involve more contingencies than a lease for years, *e.g.* the deaths of cestui que vie and the lessee, it is only a difference in amount; the loss or benefit to the reversioner or tenant for life on the falling in of a lease for years being uncertain. A notice served on 1st *May* to quit on 29th *September* could not be good, though a notice on 29th *September* to quit on 25th *March* is; *Doe v. Green* (a), *Doe v. Kightley* (b).

The second question is, whether the reservation of the first rent to be paid at the end of four months is a forehand rent? If it is not, still the best rent is not reserved. In *Doe v. Giffard* the power required the "best and most improved yearly rent" to be reserved; but the lease was for 21 years, dated 14th *September*, and reserved the first half-yearly rent to be paid on 29th *September*, the 15th day after its date. It was

(a) 4 Esp. 198.

(b) 7 T. R. 63.

held bad, on the ground that as it would expire on the 14th of *September*, and the last rent was reserved payable on the 29th, no rent would in truth be payable for the last half year beginning at *Lady-day*. That case closely applies to the present, as appears from the manner in which it is distinguished from *Doe v. Wilson* by Lord *Tenterden*. In *Doe v. Wilson* he says, 'In *Doe v. Giffard*, the power was to lease "at the best and most improved yearly rent" that could be obtained. The power under which this lease is granted, requires that there shall be reserved "the usual and accustomed yearly rent." Now as far as we have any evidence what the "usual and accustomed rent" was, it appears to have been a yearly rent payable at *Lady-day* and *Michaelmas*. I am therefore of opinion that a rent payable at those days, though the right to demand it arose in less than half a year, is a "usual and accustomed rent" within the meaning of those words in the condition contained in the leasing power.' Then *Doe v. Giffard* is recognized not overruled by *Doe v. Wilson*. In *Isherwood v. Oldknow* (a) the first half-yearly payment of the yearly rent was to be made in 27 days after the date of the lease, which was held good on the ground of the antecedent occupation of parts of the farm for different periods, averaging above six months, which appeared on the face of the lease itself. Nothing here shows that there was more than a week's occupation antecedent to the date of the lease. That would not support the replication to which Lord *Ellenborough* alludes (b), where he says, "If it had been alleged in pleading that this was a taking of the rent contrary to the power, might it not have been replied that the rent was taken merely to compensate the lessor for an antecedent occupation?" and adds, "This could not in any shape deprive the remainder-

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(a) 3 M. & S. 382.

(b) 3 M. & S. 393.

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man of any portion of his interest." But in this case the remainder-man may be injured; for in case of the death of the tenant for life on the 30th *September*, there may be a long occupation after the remainder-man's title accrues without any rent paid. If the tenant for life died on 2d *May* or 30th *September*, he would have secured to himself, in the first case, half a year's rent for about four months' occupation; in the second, the whole year's rent for about nine months. It is true that if tenant for life died on 30th *April* or 28th *September*, the remainder-man would have the same advantages as to the rent; and if the tenant for life died on 30th *April*, and the cestui que vie on 30th *September*, the remainder-man would have the land to the 4th *January*, and the whole year's rent for about five months' title. Again, if tenant for life died on 30th *September*, and the last cestui que vie on 4th *January*, the remainder-man would receive no rent for those months. But the tenant for life cannot gamble with the rights of the remote remainder-man. His duty is not to put him in jeopardy of getting less rent than he himself receives. Lord *Eldon*, in the case of the *Queensbury* leases (a), said, "There is but one criterion which our courts always attend to as the leading one on discussing the question, whether the best rent has been got or not, that is, whether the man who has made the lease has got as much for others as he has for himself; for if he has got more for himself than for others, that is decisive evidence against him." [Lord *Lyndhurst* C. B. Should not the lease have made the first half-year's rent payable at the end of the half year from its commencement? If not, it might be reserved payable at the end of the third day. This is a power to lease for life or years; the same construction must therefore be given to either description of lease. It is

(a) 5 Dow. 344; Sugden on Powers, 5th ed. 612.

not only not found that the days on which the rent was reserved are the usual half-yearly days of payment, but every presumption is that they are not. The terms of the lease must be read in their common acceptation.

Bayley B. Is it fair that a tenant for life should secure a year's rent by a nine months' occupation?]

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Lord LYNDBURST C. B. (a)—It appears to me that this power has not been properly executed. By its terms the tenant for life had a right to grant leases, reserving rent payable half-yearly; but the lease granted by him reserves rent not payable half-yearly, but at intervals very distinguishable from half-yearly periods. It has been argued that it is impossible to divide the year correctly into terms of payment strictly half-yearly, and that the power must therefore be taken to mean the usual half-yearly days of payment. I admit that if it had appeared that the days of payment here reserved were the days of "half-yearly payments" according to the usual acceptation of those words, and corresponding with each other accordingly, such reservations as those contained in the lease would be good within the power. But there is no such evidence here, and the leases offered for that purpose were inadmissible. The power then not having been executed in the terms of it, the lease is bad. The rights of the remainder-man might be seriously injured by it. Had this been the case of a lease for years, it would have been precisely within *Doe v. Giffard*; and I am not aware that that case has been overruled or impeached in *Doe v. Wilson*. On the contrary, all the judges carefully distinguished the facts of that case from it. It has been, however, argued, that as the present is a freehold lease, it is on that ground dis-

(a) This judgment was delivered in Michaelmas term 1833. An accident respecting the papers prevented the insertion of this and a few other cases in the reports of that term.

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tinguishable from *Doe v. Giffard* ; but as the injury to the reversioner may be as great in one case as the other, there is no difference between them in principle. If the remainder-man's title accrued by the death of the tenant for life on the 1st *October*, and the last cestui que vie died on 3d *January*, he would have lost all the rent accruing between those periods. As we are of opinion that the lease is for the above reasons an improper execution of the power, it is unnecessary to state any opinion on the other points which have been raised.

BAYLEY B.—I should have been glad if this lease could have been supported consistently with the terms of the power, but I am clearly of opinion that it cannot. Even if we should hold that the power is not to be strictly complied with, we must at least see whether its requisites are substantially satisfied by the lease. By the lease the best and most improved yearly rent is to be reserved by half-yearly payments. That direction requires a division of the rent as nearly as may be into two equal half-yearly payments, and, as it seems to me, that the last of those payments should be made at the conclusion of the year. I do not say that if the usage of a country throws more days into one half year than the other, it would be a deviation from the power to reserve the yearly rent on those half-yearly days ; but there is in this case a division of the year into 151 and 214 days. That is a material difference ; neither do the days correspond or are they esteemed usual half-yearly days for payment of rent. In cases of this kind the court looks to the intention of the settlor and what is fair between the tenant for life who executes the power and the reversioner. It is plain that the tenant for life should not reserve to himself an advantage unfair as against the reversioner ; and that if he does so deviate

from the power, his lease is an invalid execution of it. In this case the first rent is payable long before a half-year's occupation could take place, and the second very long before a year's. Looking at the interest of the tenant for life, he gets the year's rent for less than nine months' occupation. That may be for his own benefit, but by it he deprives the remainder-man or reversioner of some of the chances he might have had of receiving a portion of the rent had it been made payable at the end of the year. It is said, that these reservations may turn out for his benefit, but the language of the power is to be regarded, and the tenant for life is not to throw on the remainder-man, without his sanction, the uncertainty of the chances which *may* turn out to his prejudice. Suppose the tenant for life to die on 30th *September*, he would be entitled to the half-year's rent due on the 29th, and if the cestui que vie died on the 3d *January*, no rent would have been payable to the reversioner for all that interval of occupation. To take it a step further, suppose the tenant for life to die on the first 30th *September* after granting the lease, and the cestui que vie to die on the 30th *April* then next, the whole rent for that occupation would be lost to the remainder-man. These consequences appear to me to make this a lease unfair on the reversioner, and to give him a right to object to it in the present manner.

BOLLAND B.—This appears to me to be an invalid execution of the power. Had the tenant for life been dealing with his own property, he might have reserved it as he did; but having also the interests of the reversioner to attend to, he was bound not to injure them. Deal with the problem in what point of view you will, the reversioner is placed in a situation in which he may be

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deprived of rent to which he might be entitled for some part of each half-year.

GURNEY B.—The power having been expressly framed for the protection of the remainder-man, the lease ought not to be such as would do him an injury.

Rule absolute.

CONSTABLE and Another *against* ANDREW.

By agreement not under seal between the plaintiffs and other creditors of the defendant, with the defendant and his surety, the latter agreed to pay them a composition of 15s. in the pound at two fixed dates, and in consideration of the creditors agreeing to discharge the defendant from all his debts and demands on receiving the 15s. in the pound, the surety undertook to pay a

ASSUMPSIT by plaintiffs as indorsees against the defendant as drawer of a bill of exchange accepted by *Chambers*, and by them as indorsees of a promissory note against the defendant as indorser. At the trial before *Gurney B.* at the *Middlesex* sittings, it appeared that before 19th *November* 1830, plaintiffs had become holders of the bill and note for goods supplied to the defendant before 19th *November* 1830. On that date the defendant agreed to assign his whole property to the plaintiffs for the benefit of his creditors. The defence was rested on an agreement for a composition with the creditors, dated 12th *January* 1831, to which the defendant, *John Cullimore* as his surety, and the plaintiffs with the other creditors, were parties. It recited the former agreement, the desire of the defendant to cancel it, and a proposal by him, "in lieu of assigning his estates and effects as therein mentioned, to pay his several creditors the sum of 15s. in the pound on

sum down in part payment of the first instalment, and to accept a bill drawn by the defendant in part payment of the second; the creditors thereupon agreeing "to exonerate and discharge the defendant on payment of the said 15s. in the pound." It was next agreed that some bills (and a note) which if paid would have satisfied the residue of the composition money, and which had been indorsed and handed over to the plaintiffs by the defendant before the composition, "should be considered as part payment of the said 15s. in the pound." Held, that the defendant still remained liable on such of those securities as were not paid at maturity by other parties to them.

their respective debts," and "to procure *Cullimore* to become his surety for the sum of 1062*l.* 8*s.* 6*d.* part of his said debts," and then proceeded thus:—

"Now the said *J. Andrew* doth hereby agree to pay and satisfy the several persons parties hereto of the third part, the said sum of 15*s.* in the pound on their respective debts and costs in manner following, that is to say, 7*s.* 6*d.* in the pound on the 14th day of *January* instant, and the further sum of 7*s.* 6*d.* in the pound on the 4th day of *May* next, and in consideration of the said several creditors of the said *J. Andrew* agreeing as hereinafter mentioned, to discharge him from the payment of all debts and demands whatsoever due from him on the 19th day of *November* last, on receiving the said 15*s.* in the pound at the times and in manner aforesaid; and also to relinquish all claim and demand on the said *J. Andrew*, his estate or effects, under the before-mentioned agreement; he the said *J. Cullimore* doth hereby agree to pay unto *H. Ellis* and Messrs. *W.* and *C. Constable*, three of the said creditors of the said *J. Andrew*, the sum of 531*l.* 5*s.* 3*d.* on the 14th day of *January* instant, in part payment of the first instalment of 7*s.* 6*d.* in the pound, to be divided by the said *W.* and *C. Constable* and the said *H. Ellis* among the said creditors of the said *J. Andrew*, in proportion to their respective debts; and for the consideration aforesaid, the said *J. Cullimore* hath this day accepted one bill of exchange, dated the 1st *January* last, amounting to a like sum of 531*l.* 5*s.* 3*d.*, drawn by the said *J. Andrew* in favour of Messrs. *W.* and *C. Constable*, two of the creditors of the said *J. Andrew*, payable on 4th *May* next, and in part payment of the said second instalment to be divided among the said creditors respectively as aforesaid when paid. And the several creditors, parties hereto, agree to exonerate and discharge the said *J. Andrew*, on payment of the said 15*s.* in the pound as afore-

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said, of and from all claims and demands whatsoever, up to the 15th *November* last, and to give him such release for their respective debts and demands as he may require. And it was agreed that the several bills of exchange, amounting together to 271*l.* 1*s.* 2*d.* which have been already duly indorsed by the said *J. Andrew* and handed over to the said *W. and C. Constable*, shall be considered as in part payment of the said 15*s.* in the pound. And the said *H. Ellis* hereby agrees, that when the said 15*s.* in the pound as aforesaid shall have been duly paid as aforesaid, he will deliver up to the said *J. Andrew* the lease of the house aforesaid which he now holds. And it is lastly agreed, that payment by the said *J. Cullimore* or *J. Andrew* of the said sum of 531*l.* 5*s.* 3*d.* into the bank of *H. and Co.*, to the credit of the said *H. Ellis*, shall be a sufficient discharge for the amount and payment of the aforesaid bill of exchange, for the like sum to the said *W. and C. Constable*, shall in like manner be a discharge to them the said *W. and C. Constable*, without their being required to sec to the application thereof."

The total debts were 1777*l.* 19*s.* 6*d.*, of which the plaintiff's debt was 770*l.* The composition was in all 1333*l.* 9*s.* 8*d.* *Cullimore* having paid the two sums in part of it as agreed on, the residue of it consisted of the sum of 271*l.* 1*s.* 2*d.*, the amount of the bills and note in the plaintiffs' hands, including the bill and note on which the action was brought. The acceptor of the bill and maker of the note having become insolvent, the present action was brought. The plaintiffs failed in proving the requisite notice of dishonour of the bill accepted by *Chambers*, and it was then contended for the defendant that the plaintiffs could not recover on the note, as by the agreement the defendant was discharged from all liability on the securities in the plaintiffs' hands, which (it was argued) were taken as absolute payment. *Stein-*

man v. Magnus (a) was then cited, on the impression that the plaintiffs sued for their own benefit only, which it was afterwards admitted on the argument of the rule that they did not. The plaintiffs answered, that the defendant was only to be discharged in case the 15*s.* in the pound was realized to the creditors. The learned baron directed a verdict for the plaintiffs for the amount of the promissory note, but gave leave to move for a nonsuit. A rule having been obtained accordingly by *Justice*,

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Thesiger (*Ball* with him) showed cause. The question is, whether, by the terms of this agreement for a composition, the bills deposited with the plaintiffs were to be taken absolutely as payment of their demand, or merely by way of collateral security, so as to give the plaintiffs a right to sue on them, if dishonoured. In *Thomas and another v. Courtney* (b) it was held, that where a parol agreement for a composition did not contain any stipulation that the creditors should give up securities in their hands, a creditor who signed for the whole amount of his debt might retain the produce of a bill drawn by the debtor and accepted by a third person, which he held as a security for part of his debt, the effect of the agreement not being to extinguish the original debt. In that case too there was an express clause, that the creditors should release the debtors from all actions and demands on receiving a composition of 12*s.* in the pound; which composition had been paid on the amount of the plaintiffs' demand, minus the produce of the bill. The reason expressed by the court for their decision in *Steinman v. Magnus* was, that on the faith of an agreement by a creditor to accept less from his debtor than his just demand, which would not bind the former, a third person was lured in to become surety for part of the debts, in the expectation that

(a) 11 East, 390.

(b) 1 B. & Ald. i.

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the party would be thereby discharged of the remainder of them, and also that other creditors were similarly lured in to relinquish their further demands on the same supposition. But no deception was here practised on the surety *Cullimore*, who is a party to the agreement, nor on the creditors; for the payment of these bills in full was part of the security and consideration for which all the creditors agreed to accept the composition, and benefitted them as well as the plaintiffs. It was said, that these bills were to be taken as money between the creditors and the defendant, and that though the agreement states them to be indorsed and handed to the plaintiffs by the defendant himself, yet that the words "that they shall be considered as in part payment of the said 15*s.* in the pound," only leave it open to the plaintiffs to sue the other parties to the bills. There is no express clause in this agreement to discharge the defendant from liability, but the parties agreed to exonerate and discharge the defendant on payment of the said 15*s.* in the pound. That payment was intended to be made by defendant at all events, and till it is made, his liability on the bills is kept up by the agreement. Further, the bill accepted by *Cullimore* was drawn by the defendant; so that if *Cullimore* had not paid it a remedy might remain against the defendant on it. The last clause recognizes the defendant's liability.

J. Jervis (Justice with him) supported the rule. Had this action been brought by the plaintiffs, not for the benefit of the creditors but themselves, *Steinman v. Magnus* would have applied without being touched by *Thomas v. Courtney*. But the latter case is not in point, because it was not against the debtor but against a third party, his surety. Now the defendant here urges, that it was intended by this agreement that on

payment of two sums of 53*l.* 5*s.* 3*d.*, making 15*s.* in the pound, and on the defendants handing over the bills and note to the plaintiffs he should be discharged from liability. Though there is no express stipulation for the defendant's discharge from liability on them, there is an express stipulation at the end, that payment of 53*l.* 5*s.* 3*d.* and of the bill accepted by *Cullimore*, shall discharge him and the defendant. [*Bayley B.* They are not to be bound to see to the application of the money.] At all events the omission of such a provision as to the bills and note in the plaintiffs' hands, shows that the indorsing and handing them over to the plaintiffs was, as to the defendant, to be considered an absolute discharge. That must have been the impression of the surety.

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BAYLEY B.—I entertain no doubt in this case, which turns entirely on the construction of this agreement. Its fair meaning is, that the bills and notes in the plaintiffs' hands shall, if paid *aliunde*, be considered as payment of so much of the defendant's debts as they amount to, but that the defendant should remain subject to all his liabilities as indorser. The agreement is substantially this; *Andrew* proposes to pay his creditors 15*s.* in the pound on their respective debts, at two equal instalments, on the days mentioned. Then in consideration that the creditors will discharge him from all his debts, and will relinquish all demands on him under a previous agreement for which the present was substituted, the surety *Cullimore* agrees to pay the sum of 53*l.* 5*s.* 3*d.* in part payment of the first instalment, and accepts a bill for a like amount on account of the second; and the creditors agree to discharge and exonerate *Andrew* "on payment of the said 15*s.* in the pound." Now if it was the undertaking of the parties that these bills and note for 27*l.* 1*s.* 2*d.* should at all events be con-

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sidered as money, and that the risk of default in paying them by the other parties should not attach on the defendant *Andrew*, but on the creditors at large, that would have been so material a condition that it would naturally have formed the subject of express stipulation. Then follows the clause on which the whole question arises. "And it is agreed that the several bills of exchange, amounting together to 271*l.* 1*s.* 2*d.*, which have already been duly indorsed by the said *J. Andrew* and handed over to the said *W. and C. Constable*, shall be considered as in part payment of the said 15*s.* in the pound." Now if these bills and note were to be taken as money why was this clause introduced? To hold that they were to be considered as part payment "absolutely" appears to me inconsistent with the preceding terms of the agreement. It means, that if paid they should be part payment of the 15*s.* in the pound, and if not paid, the defendant, as indorser and drawer, was to remain liable upon them as in ordinary cases. The effect will be, that if the payee or acceptor fail to pay, the defendant would be liable, but only on his original undertaking, viz., to pay 15*s.* in the pound. Thus, if the bills are honoured, that payment will discharge him; if dishonoured, the defendant will only be liable on them *pro tanto*. The last clause does not discharge the defendant and his surety absolutely and at all events, but exonerates them from looking to the due application by the trustees of the money paid to them as such, which they might otherwise be bound to do.

BOLLAND B.—I cannot see how a doubt can arise on this agreement. The debtor proposes to pay his creditors 15*s.* in the pound on their debts, by two modes. In his uncle *Cullimore* he finds a friend, who advances and secures 1062*l.* in part of that composition. To make up the residue there are certain bills and a

note, for the amount of which last the verdict is given. Against both the parties to that note, the defendant and *Peacock*, the plaintiffs have remedies; and if it had been intended that the former should be withdrawn from his liability, and that *Peacock* only should remain liable, the agreement would have stipulated accordingly.

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GURNEY B.—I continue of the same opinion which I entertained at nisi prius. If it should be held that these securities were taken as absolute payment, the agreement would in truth have only secured the payment of 11s. 6d. in the pound.

Rule discharged (a).

(a) See *Good v. Chasman*, 2 B. & Adol. 328; *Lewis v. G. Bowen Jones*, 4 B. & Cr. 306; also 4 C. & P. 151. *Emes v. Widdowson*.

EDWARDS *against* DIGNAM.

A Writ in "trespass" indorsed for a debt of 11l, was served on 4th October 1833. The declaration was in "trespass on the case on promises," and was delivered on 29th October. A rule having been obtained on the 2d November to set aside the proceedings on the ground of variance between the writ and declaration, *King v. Skeffington* (a), the court set aside both writ and declaration on the authority of that case, saying, that the objection to the writ itself, which should have been taken earlier, was not taken, and that the objection on the ground of variance did not arise until the declaration was delivered, when it was made accordingly. That objection goes to both writ and declaration. Rule absolute. *Petersdorff* for, *Burney* against the rule (b).

Writ in trespass indorsed in debt, and declaration in assumpsit. Writ and declaration were both set aside for variance, though the objection to the writ itself had not been previously taken.

(a) *Ante*, Vol. III. 318.

(b) Decided in *Michaelmas* term 1833. See *ante*, 203, n.

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ELLISON *against* ROBERTS.

If a defendant is misled by the plaintiff's indorsing on the writ a larger sum than is due, and appears in consequence, instead of paying the sum really owing, with the costs of the writ, in eight days, as he would otherwise have done, the court or a judge will stay the proceedings on a like payment, if he applies promptly after service of a declaration, accompanied with particulars claiming the sum really due.

THE writ served was indorsed for 20*l.* 1*s.* 6*d.* debt, and 2*l.* 15*s.* costs. Appearance on 26th *August*. Declaration delivered 24th *October*, with particulars of demand claiming only 12*l.* 1*s.* 6*d.* On 5th *November* interlocutory judgment was signed for want of a plea within 24 hours after demand of plea. On the 6th *November* a rule was obtained to set aside this judgment with costs, on an affidavit of the defendant's stating the above facts, and that the defendant would have paid the money without appearing had the writ claimed only 12*l.* 1*s.* 6*d.*

The plaintiff in reply swore that he held two acceptances of the defendant, one for 20*l.* the other for 12*l.*, and that he sued on the first. Cause was shown against the rule; first, that if the defendant was misled, he should have informed the plaintiff; secondly, that the application was too late; thirdly, that the writ being properly indorsed it might have been set aside, and that defendant might have tendered the sum actually due. In support of the rule it was said, that no mistake about the bills appeared; that the 20*l.* bill was not shown to be due; that as the real sum was not indorsed on the writ, the defendant was misled, and the whole object of requiring the indorsement was defeated.

BAYLEY B.—As the wrong indorsement on the writ deprived the defendant of the opportunity of paying the debt within eight days after the service, he would have been permitted to pay the debt, with the costs of the writ only, had he come to the court in time. But as proceedings now go on in vacation, and by *Reg. Gen. Mich.* 3 *Will.* 4. No. 10. [Vol. III. p. 4.,] it is ordered, “that if the plaintiff omit to insert in the writ any

matter required by the act, such writ &c. may be set aside as irregular, on application to the court out of which the same shall issue, *or to any judge*," the defendant should have applied to a judge in vacation; *Cox v. Tullock* (a). Great fruitless expense might be otherwise incurred if the application might be postponed until term. The defendant ought, at all events, to have made the application I have suggested promptly after the delivery of the declaration. By *Reg. Gen. Hil. 2 Will. 4. No. 33.* [Vol. II. 843.] "no application to set aside proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after notice of the irregularity." Now by the defendant's neglecting to apply to a judge within the eight days preceding the term, judgment was signed and subsequent costs have been incurred. The plaintiff should not have his costs of this motion, as no mistake appears on oath.

Per Curiam.—Rule absolute on the defendant's paying within a week the debt and costs hitherto incurred, except the costs of this application. If such payment be not made, judgment to be signed absolutely, and execution to issue for the amount, and this rule to be discharged without costs (b).

(a) *Ante*, Vol. III. 578. (b) Decided in *Michaelmas* term, see *ante*, 203 n.

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Where an arrest takes place for a much larger sum than is afterwards paid into court, yet if the plaintiff takes the smaller sum out of court without proceeding further in the cause, the defendant has no right to his costs, under 43 G. 3. c. 46. s. 3.

Rowe *against* RHODES.

CRESSWELL had obtained a rule in *Michaelmas* term, calling on the plaintiff to show cause why the defendant should not be allowed his costs under 43 Geo. 3. c. 46. s. 3., he having been arrested for a larger sum than the plaintiff had recovered. The arrest took place on 13th *April* 1833 for 91*l.*, to which extent it was admitted that the plaintiff had a fair claim up to 6th *March*, when a bill was remitted by the defendant to the plaintiff's agent *Johnson*. On the 8th *March*, the receipt of the bill was acknowledged in his absence from home by *Jane Johnson*. The defendant hereupon insisted that the bill had been taken by the plaintiff as absolute payment on 6th *March*. On 6th *April* he returned home, and wrote to the defendant demanding the money, and saying he had no authority from the plaintiff to take the bill in payment. However it was not returned, and having been handed by *Johnson* to the plaintiff, he presented it and got the amount on 9th *June*, the day it became due. A balance of 7*s.* 7*d.* having been paid into court on 31st *May*, the plaintiff refused to take it out then, and repudiated the bill; but after it had been honoured, viz. on 18th *June*, he took the above sum out of court and taxed his costs to 9th *June*.

Kelly showed cause in this term. As it might have been a question at the trial of the cause whether the plaintiff had not made the bill his own by keeping it, he presented it when due; but directly after it was honoured he took the money out of court, quâ nominal damages, with costs to that time, to which he was entitled, the plaintiff's demand having been paid *pending* the action (*a*). The payment into court admits the

(a) See *Toms v. Powell*, 7 East, 536; 6 Esp. 40, S. C. See 1 Camp. 559, notis. 3 Camp. 331; 3 East, 316; Holt's C. N. P. 6.

plaintiff to have a good cause of action, and consequently the defendant's liability to costs down to that time. Then it ousts the operation of 43 *Geo. 3. c. 46*; for a whole train of decisions establish that unless the smaller sum of money ultimately recovered in the action be recovered by judgment on a verdict, the act does not apply. *Laidlaw v. Cockburn* (a) is the only case to show that after the plaintiff has arrested for a larger sum than is afterwards paid into court and accepted by him without proceeding further in the action, the defendant can obtain his costs under 43 *Geo. 3. c. 46. s. 3.*; but *Cammack v. Gregory* (b), *Rouveroy v. Alfson* (c), *Butler v. Brown* (d), and *Davy v. Renton* (e), are later cases, in which that decision has been cited and overruled both in the King's Bench and Common Pleas. In *Butler v. Brown*, the court of C. P. say that it has been decided in five cases since *Laidlaw v. Cockburn*, that the statute is not applicable to those circumstances, and cite *Clarke v. Fisher* (f), where Lord Ellenborough held that a "recovery" must mean a recovery by judgment; and *Lawrence J.* added, that as the rule for payment of money into court is always obtained on payment of costs, it is therefore incongruous that the defendant should afterwards apply to discharge himself from the payment of them.

Cresswell contra. This was an arrest for which there was no "reasonable or probable cause." The defendant remitted to the plaintiff's agent a bill of an amount sufficient to cover the debt, and it is not until long after that his agent declares he will not take the bill in payment, and demands the money. The plain-

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(a) 2 N. R. 76. M. 1805.

(b) 10 East, 525. H. 1809.

(c) 13 East, 90. M. 1810.

(d) 1 Br. & B. 66. E. 1819.

(e) 2 B. & Cr. 711. E. 1824.

(f) *Hallock on Costs*, 2d edit. 132; and 1 Smith's R. 428.

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tiff however continues to hold the bill, which was presented and paid when due; yet during its time of running the defendant was arrested for the whole debt, and in the progress of the cause paid one shilling into court as nominal damages, thus in fact tendering the issue that the bill was taken by the plaintiff in payment of his demand. The arrest then was vexatious, having been made not only before the bill was dishonored, but before it was returned to the defendant. Now in *Butler v. Brown* and *Davey v. Renton*, no fact was relied on to prove the vexatious arrest, except the taking the smaller sum out of court. In *Plummer v. Savage* (a), this court seems to have thought it incumbent on the plaintiff to give a satisfactory reason for having taken out of court a less sum than that for which the arrest took place. In *Payne v. Acton* (b) a verdict had been taken at the trial subject to an award, the arbitrator having found a less sum to be due than that for which the arrest took place. On the defendant's motion for costs on this act, *Dallas C. J.* said, the courts always attended to the circumstance of parties going before an arbitrator, and the costs were refused on the ground that no vexation was shown. In *Robinson v. Elsam* (c), *Bayley J.* having recognized the position that a case is within 43 *Geo. 3. c. 46.* where the sum "recovered" is ascertained by the award of an arbitrator, (for which *Neale v. Porter* (d), and *Burns v. Palmer* (e) had been cited,) goes on to show in the case before the court, that a reference of an attorney's bill to the master for taxation is a similar case entitling the defendant to costs under this act. [*Bayley B.* The finding of an arbitrator to whom a cause is referred by order of a court of *nisi prius* after a verdict has been

(a) 6 *Pri. R.* 126. *M.* 1818.(b) 1 *Br. & B.* 272. *T.* 1819.(c) 5 *B. & Ald.* 661. *E.* 1822.(d) *T.* 44 *Geo. 3. K. B.*; *Tidd*, 9th ed. 983. (e) *Ibid. Scacc. M.* 1804.

taken at the trial, is similar to the verdict of a jury (a); but if the reference is by collateral agreement, it is not within the statute. It may be, that in *Robinson v. Elsam* the master was substituted for the jury by the terms of the reference.] *Abbott C. J. and Best J.*, thought *Robinson v. Elsam* a case within the spirit and object of 43 *Geo. 3. c. 46*. An attorney had there sued for his bill, and arrested the defendant for more than the master afterwards allowed him on reference to him for taxation under a judge's order. The circumstances of the case entitle the defendant to the benefit of this act, as the decisions on the statute have varied.

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**BAYLEY B.**—If the decisions on the application of 43 *Geo. 3. c. 46*. have been so numerous and conflicting as not to leave a fair balance on one side or the other, I should adhere to the maxim, cotemporanea expositio est optima (b). Now the act passed in 1803, and it appears from the admission of *Littledale* in moving for a rule under it in *Rouvery v. Alefson*, that in 1804 and 1805, two cases were decided by the King's Bench adversely to the defendant's right to recover costs, where the arrest having been for a larger sum than was afterwards paid into court, the plaintiff notwithstanding took the less sum out of court and stayed further proceedings. In 1805 *Laidlaw v. Cockburn* occurred in the Common Pleas, and *Rooke and Chambre Js.* granted a rule treating the case as within the act. But on that case being cited in 1809 in

(a) In *Keene v. Deble*, 3 Br. & Cr. 492. M. 1824. Bayley J. said, that in *Neale v. Porter* and *Burns v. Palmer*, "a verdict was taken on which judgment was afterwards entered; the money was therefore recovered in the action," and that was so in *Payne v. Acton*, 1 Br. & B. 278, and *Sherwood v. Taylor*, 6 Bingh. 280; *Turner v. Prince*, 5 Bingh. 191. See also *Thompson v. Atkinson*, 6 B. & Cr. 193.

(b) 4 Inst. 138.

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*Cammack v. Gregory* (a), the King's Bench held, that in order to bring a case within the provision in question there must be a *recovery* of the smaller sum, which they explained to be by the verdict of a jury. *Rouveroy v. Alefson* (b) followed in 1810, and the court of King's Bench referred to its former decisions as well as to *Laidlaw v. Cockburn*, and again held that the statute did not apply to a case like the present. In *Butler v. Brown* (c) the court of Common Pleas reconsidered the decision of *Laidlaw v. Cockburn*, and *Dallas C. J.* said, it had been decided in five subsequent cases that the statute did not apply to such a case as the present. *Laidlaw v. Cockburn* was there treated as a deviation from the current of decisions, and was abandoned and disavowed accordingly. *Robinson v. Elsam* (d) was a subsequent case in which an action having been brought on an attorney's bill, the bill was referred to the master to be taxed, who reduced it below the sum for which the arrest had taken place. *Abbott C. J.* rested his judgment on the jurisdiction of the court over attornies as its officers, saying it was therefore unnecessary to decide whether the case was within the statute, though it appeared to him to be within its spirit and object. The other judges made the remarks which have been cited in favour of the defendant, but I think the real ground of the case is, that the master being to be considered the constituted tribunal, with peculiar jurisdiction for taxing a bill of costs referred to him by the court, the sum which he should find to be due would be the sum "recovered." In *Davey v. Renton* (e) the arrest having been for 15*l.* and upwards, 6*l.* was paid into court; and there was a very strong affidavit to show that only that sum was due. The cases were brought before the court, and *Abbott C. J.*

(a) 10 East, 525.

(b) 13 East, 89.

(c) 1 Br. &amp; B. 66.

(d) 5 B. &amp; Ald. 661.

(e) 2 B. &amp; Cr. 711.

said, "It is very desirable to lay it down as a general rule, that where money is paid into court by the defendant and taken out by the plaintiff in an early stage of the cause, that shall not be considered as a sum recovered by the plaintiff within the meaning of the statute. The fact of the plaintiff's taking money out of court is not conclusive against his right to recover a larger sum; he may have been induced to accept the smaller sum to save the expense of litigation. It is the sum accepted by him in lieu of the sum which he might perhaps have recovered if he had proceeded to judgment. We are all of opinion that the statute does not apply to such a case." This then being the state of the decisions in the King's Bench and Common Pleas on this point, and it not appearing that the point has been since agitated, we think we ought to abide by them. That being so, the merits are not in discussion.

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VAUGHAN B.—Were this question *res integra*, we should look to the words of the statute and sift the meaning of the word *recover*. That word, however, as used in the act, points to recovery by verdict or judgment in the action, and to execution thereon. Though the cases are conflicting, they preponderate in favour of the plaintiff, and for some years before I left the Common Pleas it was considered that *Laidlaw v. Cockburn* was wrong. Then whether we look at the act or the decisions, the defendant is excluded from a right to costs.

BOLLAND and GURNEY Bs. concurred.

Rule discharged with costs, though not moved with costs, as costs would have been given had it been made absolute.

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SUMMERS *against* GROSVENOR.

The defendant having been arrested for 33*l.*, a verdict was taken at the trial for that amount, subject to the award of an arbitrator, who ordered the verdict to be reduced to 3*l.* 3*s.* The defendant having moved for his costs under 43 G. 3. c. 46. s. 3. : Held, that the above facts made it incumbent on the plaintiff to "make it appear to the satisfaction of the court" that he had "reasonable or probable cause" for arresting the defendant, and in the absence of a clear statement to that effect, the court made the rule absolute.

TALFOURD Serjt. had obtained a rule for allowing costs to the defendant pursuant to 43 Geo. 3. c. 46. s. 3. The defendant was arrested for 33*l.* At the trial of the cause at *Shrewsbury* the plaintiff had a verdict for that sum, subject to reduction by the certificate of an arbitrator, who certified that only 3*l.* 3*s.* was due to the plaintiff, and directed the verdict to be entered accordingly. The defendant's affidavit also stated the arrest to be malicious, and without reasonable or probable cause, and that at the time of the arrest he believed the plaintiff was indebted to him. The plaintiff's affidavit denied the malice &c., and asserted that defendant had several times promised to pay him money on account of several bills delivered to him for money due to plaintiff, and that before the plea he knew of no claim against him by defendant or of what it consisted.

Ludlow Serjt. showed cause. The original demand had never been lessened on a balance struck between the parties, and the plaintiff did not know of any cross-demand on him by the defendant. Then the arrest was justified, and it has never been held that the mere fact of a verdict having been given for a smaller sum than that for which the arrest took place, was alone a reason for depriving a plaintiff of costs.

Talfourd Serjt. was stopped.

BAYLEY B., after stating the section of the act and its proviso, added—There must be some affidavits on the defendant's part to ground his application for costs, and I think that what he has here sworn is sufficient

to throw the burden on the plaintiff of showing reasonable or probable cause for arresting for 33*l.*, when the sum which having been found by the verdict we must *primâ facie* take to be that really due, was 3*l.* 3*s.* only. The plaintiff might have easily shown how he considered himself entitled to the larger sum, by what witnesses he expected to prove his claim to that extent before the arbitrator, and why he failed in so doing. In the absence therefore of any affidavit by the plaintiff of these facts, which lay peculiarly within his knowledge, the verdict shows that there was no reasonable or probable ground for the arrest, and the rule must be absolute.

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VAUGHAN B.—It appears to me that the defendant is entitled to the benefit of this enactment, according to its reasonable construction when read with the proviso. The very circumstance of the amount of the verdict entered raises a strong presumption that the arrest was without reasonable or probable cause. The plaintiff does not go the length of swearing that the 33*l.* was due to him, but merely that he had sent in some accounts of money due, and that there had been promises to pay money on account. The defendant swears he believes the arrest to have been malicious ; that, I think, was unnecessary.

BOLLAND B. concurred.

GURNEY B.—The defendant states, that at the time of the arrest he believed the plaintiff indebted to him. That made it incumbent on the plaintiff to show that he had reasonable and probable cause to arrest, and for the amount he did ; but no facts have been stated by him to lead us to such a conclusion.

Rule absolute (*a*).

(*a*) See the preceding case.

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PICKUP and Another Executors *against* WHARTON.

Where in an action commenced by an executor before 1st June 1833, he sued necessarily in his representative character, and declared only on promises to his testator in his life-time, judgment as in case of a nonsuit was obtained in November 1833, but the executor took no step after 1st June in that year: Held, that he was not liable to pay the whole costs of the cause, but only such costs as had been occasioned by his own negligence in not proceeding to trial.

ASSUMPSIT on a promissory note given to the plaintiff's testator in 1812, without any counts on promises to the plaintiffs as executors. The action was commenced in June 1832, and the defendant held to special bail. Pleas: general issue and statute of limitations (a). Notice of trial was given for the summer assizes of 1832, but countermanded, and a rule for judgment as in case of a nonsuit, obtained in *Michaelmas* term 1832, was discharged on a peremptory undertaking; but fresh default having taken place, judgment as in case of a nonsuit was finally had in *Michaelmas* term 1833, and the master taxed to the defendant the whole costs of the cause against the plaintiff.

Butt had obtained a rule for reviewing the master's taxation and confining his allocatur to such costs only as accrued after the plaintiff's wilful neglect to proceed to trial; *Woolley v. Sloper* (b). The plaintiff's affidavit stated facts to show that the poverty of the defendant had occasioned their delay to proceed and final abandonment of the suit, and that he had promised to pay, though verbally only, within six years.

Addison now showed cause for the defendant on an affidavit, stating, that in *July* 1832 he had apprised the plaintiffs of his intended defence on the statute of limitations. The master was right in allowing the defendant the whole costs under these circumstances. The rule of law exempting executors from liability to

(a) See *Sarel v. Wine*, 3 East, 409; *Jones v. Jones*, 1 Bingh. 249; *Barnard v. Higdon*, 3 B. & Ald. 213; *Dowbiggin v. Harrison*, 9 Barn. & Cress. 666; *Jobson v. Foster*, 1 B. & Adol. 6; *Slater v. Lawson*, id. 893.

(b) 9 Bing. 754.

judgment for costs where they necessarily sue in their representative character, *e. g.* on a contract entered into with their testator in his lifetime, did not hinder the court from ordering them to pay costs where the judgment against them has been occasioned by their own wilful neglect or want of diligence in investigating their right to sue. If the date of the note was not sufficient warning to the plaintiffs, they ought not to have proceeded after being informed of the defence, or at least after plea pleaded, and being aware that the promise set up was only verbal. The point held in *Woolley v. Sloper* was, that on a judgment as in case of a nonsuit, an executor plaintiff, who has been guilty of wilful negligence in not proceeding to trial according to notice, is not liable to the costs of the cause, but only to those occasioned to the defendant by such wilful negligence. But that case was decided on the strict terms of 14 *Geo. 2. c. 17.*, without reference to former decisions. It is contrary to *Coomber v. Hardcastle (a)*, where the plaintiff, an administrator, having become a party to an action on a contract which had been annulled with his privity, the court ordered him to pay the costs even after he had obtained a verdict; *Rooke J.* saying, "It is clear upon the statute [23 *Hen. 8. c. 15.*] that when an executor or administrator necessarily sues as such, he is not liable to costs; and yet it has been holden, that where an executor or administrator is guilty of misbehaviour he shall pay costs, as where he suffers himself to be nonprossed or has knowingly brought a wrong action, or been otherwise guilty of wilful default, or has discontinued or *not proceeded to trial according to notice.*" For this last position *Hawes v. Saunders (b)* and *Eaves v. Mocato (c)* are distinct authorities. After citing *Hawes v. Saun-*

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(a) 3 B. & P. 115.

(b) 3 Burr. 1584.

(c) Salk. 314.

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ders (a) and *Higgs v. Warry* (b), as cases in which executors who suffered judgment of nonpros were held liable to pay costs, he argued, that as the judgment as in case of a nonsuit proceeded on the same ground, viz. the negligence of the plaintiff, the defendant was as much entitled to costs in one as the other. In neither case are costs awarded on the face of the record.

Butt contra was stopped.

BAYLEY B.—This action having been commenced before 1st June 1833, when 3 & 4 Will. 4. c. 42. s. 31. came into operation, the passage in Mr. *Tidd's* valuable Book of Practice (c) applies, that an executor or administrator, when he necessarily sues in his representative character, is not liable to costs on a nonsuit or verdict. It is also laid down in the same book, that he is so liable to costs upon a judgment of non pros, and that has been the settled rule ever since I remember *Westminster Hall*. He is held so liable because he is guilty of personal default in not declaring or replying or taking any other proper step. That default is stated on the face of the record, and the judgment is, therefore it is considered that the plaintiff take nothing by his writ, and it is further considered that the defendant do recover against the plaintiff so much for his costs of defence. I have always considered the personal default so stated on the record as the ground for the adjudication of costs, viz. that the plaintiff has failed in his action by personally neglecting to proceed with it. In the case of discontinuance by an executor, he is liable to costs, or the reverse, at the discretion of the judge, who will refuse leave to discontinue except on payment of costs, if he sees blame imputable to the

(a) 3 Burr. 1584.

(b) 6 T. R. 654.

(c) 9th ed. 978, 979.

plaintiff in improperly commencing the action ; whereas if he sees that the action was fairly brought, but that from subsequent circumstances its further prosecution became improper, he may relieve such a plaintiff from payment of costs. However, Mr. *Tidd* proceeds to lay down generally (p. 979,) that “an executor or administrator shall pay costs on a discontinuance where he has knowingly brought a wrong action or been otherwise guilty of a wilful default, or for not proceeding to trial according to notice ; but otherwise he is not liable to costs in either of these cases ; nor where he merely sues en autre droit, is he liable to costs on a judgment as in case of a nonsuit.” Now a judgment in case of a nonsuit given under 14 *Geo. 2. c. 17.*, has precisely the same effect as judgment against an executor on nonsuit. Then, as in the latter case, a defendant has no costs awarded to him on the record against an executor (a), he will have none when he has a similar judgment under the statute. *Booth and others executors v. Holt* (b), which decided that executors are not liable to costs on suffering judgment as in case of a nonsuit under 14 *Geo. 2. c. 17.* does not stand alone, but has been acted on to the present time. The consequence of a contrary practice would be, that in every such case the court would have to try whether the executor had improperly commenced the action or not.

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VAUGHAN B.—In the cases relied on for the defendant improper conduct and wilful default were fixed on the plaintiffs.

BOLLAND B.—In *Eaves v. Mocato* (c) it is laid down,

(a) *Bigland v. Robinson*, 3 Salk. 105, &c. &c.

(b) 1 H. Bla. 277. H. 1794 ; see S. P. per cur. in *Bennett v. Coker*, 4 Burr. 1928. M. 1766. and note ibid.

(c) 1 Salk. 314, S. C. 2 Lord Raym. 865, nom. *Elwes v. Mocato*.

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that an executor shall not pay costs of a nonsuit where he cannot sue but as executor, but that in trover by an executor upon a conversion in his own time, he shall, if nonsuit, pay costs, "for he need not name himself executor" (a). His liability to costs when nonprossed rests on his negligence. The executor's duty is to enforce the testator's securities; a doctrine recognized in *Coombe v. Hardcastle* (b), where Lord *Alvanley* admitted that an executor or administrator necessarily suing as such is not made liable to costs by statute 23 Hen. 8. c. 15. where there is a verdict against him, and that no costs could be awarded against him on record, stating the reason to be, that he is not supposed to know the imbecility of his own suit. But as the executor there had abused the process of the court by suing against good faith and his own agreement, the court ordered him to pay costs for that contempt. That principle was acted on in *Woolley v. Sloper*, where the executor, having suffered judgment as in case of a nonsuit, was held only liable to pay costs incurred by his own wilful neglect to proceed to trial.

GURNEY B.—In *Coombe v. Hardcastle* the executor being aware that no cause of action existed against the defendant, lent his name to a third person under an indemnity from him. For such monstrous abuse of the process he was mulcted in costs.

The court were about to make the rule absolute, but allowed it to stand over to *Easter* term, on the suggestion of *Addison* that the judgment as in case of a nonsuit had been obtained after 1st June 1833, when 3 & 4 Will. 4. c. 42. s. 31. came into force, and that a question was then pending in K. B. in *Freeman v.*

(a) *Brassington v. Ault*, 2 Bing. 177.

(b) 3 B. & P. 117.

Moyes (a), whether the effect of that statute was retrospective.

Afterwards, on *May* 8th, in *Easter* term, *Butt* for the plaintiffs admitted that in the case mentioned the King's Bench had held the statute retrospective, but contended that this court would in its discretion under that act pronounce the same rule.

LORD LYNTHURST C. B.—There is nothing to show that the plaintiff had not a good cause of action, had not the defendant's poverty made it unadvisable to proceed.

PARKE B.—Here the executor took no step after 3 & 4 *Will.* 4. c. 42. s. 31. passed; then his situation as to costs ought not to be altered.

Rule absolute.

(a) Now reported 1 *Adol. & Ell.* 341. Stat. 3 & 4 *Will.* 4. c. 42, s. 31. enacts, that "in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall (unless the court in which the action is brought, or a judge of any of the said superior courts shall otherwise order) be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself, and the defendant shall have judgment for such costs, and they shall be recovered in like manner.

BENTLEY *against* Hook.

A Rule had been obtained on behalf of the sheriff of *Oxon*, under the adverse claim act 1 & 2 *Will.* 4. c. 58. s. 6., calling on the assignees of *Hook* a bankrupt
 The court will not interfere under the adverse claim act 1 & 2 *Will.* 4. c. 58. s. 6. in favour of a sheriff who has seized goods under a *fi. fa.*, unless an actual claim of the property in question appears to have been made before moving for the rule.
Semble, in an issue directed under the act, the claimant should be the plaintiff and the execution creditor the defendant.

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and his execution creditor, to appear and state their claim to the goods seized under a fi. fa. for 33*l*. The affidavit, without stating in terms a claim by the assignees, stated "that the sheriff had received notice that the defendant had become a bankrupt, and had been informed and believed that a fiat of bankruptcy had been issued against him and assignees chosen." The sheriff offered to bring the 33*l*. into court.

Addison for the execution creditor. The facts in the affidavit do not show such a claim by the assignees to exist as entitles the sheriff to the protection of this act. *Isaac v. Spilsbury* (a) shows, that the court will not act upon the mere *quia timet* of the sheriff without actual claim made.

R. V. Richards for the assignees asked for costs, to be paid them by the sheriff, no notice of claim by them being shown, but information and belief only.

Cooper in support of the rule. The sheriff was bound to take notice of the fiat in the Gazette. But the objection to entertain this rule is waived by the appearance in court of all the parties. He cited *Lewis v. Eicke* (b). In *Isaac v. Spilsbury* the claim made was held null, not having in fact been made on the part of the wife.

BAYLEY B.—No part of the affidavit shows that the assignees have actually claimed the goods. It should have shown from whom the notice to the sheriff came. As it stands it might be mere hearsay.

VAUGHAN B.—To give this court jurisdiction to

(a) 10 Bing. 3.

(b) *Ante*, 157.

grant this rule, the sheriff must show such an actual claim to have been made to the goods in question as might be followed by an action.

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GURNEY B.—The sheriff may now move to enlarge the return of the writ, and may renew this application when the claim is made.

Rule discharged with costs.

Cooper afterwards produced a sufficient affidavit and renewed his motion, which was granted; *Bayley* B. saying, Let the assignees sue the execution creditor either in trespass, trover, or money had and received; or by consent an issue may be taken to try whether the goods are the property of the claimants or not. In the latter case the claimants will be the plaintiffs. That would be their situation in an action of trover, and I have always thought that the course of that action should be followed in issues of this kind.

BATES *against* PILLING.

A Bailable capias having been issued herein for 24*l.* 4*s.* 9*d.*, the bailiff sent to the defendant's attorney to say that the writ should not be executed if he would undertake that a bail bond should be given. A bail-bond was accordingly given and bail above put in in due time and perfected. The arbitrator to whom the case was referred at the *York* assizes awarded 13*l.* 5*s.* A rule having been obtained for allowing the defendant his costs under 43 *Geo.* 3. c. 46. s. 3.,

A defendant against whom a bailable capias had issued was not arrested, but a bail-bond was given and special bail put in and perfected in due time: Held, that not having been "arrested" as well as held to special bail, he had no remedy for costs against the plaintiff, though he did not recover a sum for which the defendant could be held to bail, and less than half of that for which this arrest took place.

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*R. Alexander* showed cause. As no actual arrest has taken place, this case is not within the words of the act "arrested and held to special bail." *Berry v. Adamson* (a) shows that attending at the house of a sheriff's officer, pursuant to a message from him to that effect, and there executing a bail-bond, is not an arrest so as to support an action for malicious arrest. In *Amor v. Blofield* (b) a defendant against whom a bailable writ had issued for 28*l.*, was allowed to file common bail without being arrested, and was held not entitled to the benefit of the rule here moved for, though only 14*l.* was recovered. *Handley v. Levy* (c), *Doulan v. Brett* (d), *Erle v. Wynne* (e), show that the words of this act are now strictly adhered to.

*R. V. Richards* contrà. The requiring excessive bail is as much within the object of this act as the actually arresting for too large a sum. In *Amor v. Blofield* special bail was not put in. This act was not in contemplation in *Berry v. Adamson*; the question there being, whether the facts in evidence proved the actual malicious arrest which it was incumbent on that plaintiff to prove. No arrest need be shown in actions on bail-bonds, *Haley v. Fitzgerald* (f); nor can the bail traverse the arrest, *Taylor v. Clow* (g). [*Bayley B.* Such defendants are estopped by their own act from making that traverse.]

BAYLEY B.—The enacting words of 43 *Geo. 3. c. 46.* (intituled "an act for the more effectual prevention of frivolous and vexatious arrests") apply to all actions wherein the defendant or defendants shall be arrested *and* held to special bail. Those are not synonymous

- (a) 6 B. & Cr. 528.      (b) 9 Bing. 91.      (c) 8 B. & Cr. 637.  
 (d) 10 B. & Cr. 117.      (e) *Ante*, Vol. III. 375.      (f) *Str.* 643.  
 (g) 1 B. & Adol. 223.

terms, but require different proceedings in which different parties act. *Berry v. Adamson* treats them accordingly. For, as the plaintiff had there been put to the difficulty of procuring bail, the case would be in close analogy to this act, had arrest and giving a bail-bond been synonymous. But Lord *Tenterden* asked, "Has the defendant been either actually or constructively arrested and kept in prison? and added, *Arrow-smith v. Le Mesurier* (a) shows he has not." But *Amor v. Blofield* is an instance of a similar application to the present, in which, as there was neither actual arrest nor a holding to special bail, the judgment goes far beyond the point urged for the defendant in this case, and the expressions of *Tindal C. J.* and *Bosanquet J.*, clearly distinguish between arrest and holding to bail, treating them as different things. That being so, and only the copulative "and" being used, we ought not to read it in the disjunctive "or."


VAUGHAN B.—In the introductory part of section 1 of this act it is provided, that no one shall be arrested or held to special bail, while in the subsequent part *and* is interposed in lieu of *or*. In the third section now in discussion the words are "arrested *and* held to special bail." Then both expressions must be taken to have been advisedly used by the legislature. The act is penal as well as remedial, and I think that arresting as well as putting in special bail is requisite in order to bring a case within its purview. I think that in the converse case putting in special bail is necessary as well as actual arrest.

BOLLAND B.—I entertain no doubt, and agree with my brother *Vaughan* as to the use of the disjunctive

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(a) 2 New R. 211.

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“or” and copulative “and,” as found in different sections of the act. *Amor v. Blofield*, if not precisely this case, shows that the court of Common Pleas considered “arrest” and “holding to special bail” as different things.

GURNEY B. concurred.

Rule discharged.

KING *against* MONKHOUSE.

If a plaintiff living in a place not “within any city, town, parish or hamlet,” (c. g. *Gray's Inn*) and suing in person, describe himself as of the extra-parochial place, it is sufficient under the uniformity of process act, 2 Will. 4. c. 39. s. 12.

THE affidavit of debt described the plaintiff of *Gray's Inn Square, Middlesex*, which appeared to be the fact by the defendant's affidavit. The capias was indorsed as issued in person by *W. H. King*, who resides at No. 7, *Gray's Inn Square, London*. On motion to set it aside, cause was shown that *Gray's Inn* being extra-parochial was a sufficient description, and *London* was a proper addition, as the usual direction added to persons living in *Gray's Inn*. In support of the rule it was said, that *Gray's Inn* should have been laid as the general district. It is in *Middlesex*, not *London*. *Per Curiam*—Stat. 2 Will. 4. c. 39. directs by section 12, that in the case of a plaintiff suing in person, the memorandum shall mention “the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any. Now as this plaintiff lives in a place not within any city &c., the description seems as good as could be given. Rule discharged. *Mansel* for, *Hutchinson* against the rule (a).

(a) See *Ditcham v. Chivis*, 4 Bing. 70.

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GREGORY *qui tam* &c. *against* ELDRIDGE.

**PLATT** moved to stay proceedings until security for costs should be given. It appeared from the defendant's affidavit that the plaintiff sued *qui tam* in this and several other actions for penalties in keeping unlicensed places for dancing and music. He was brother-in-law of his attorney in all the actions, and in poor circumstances, and belief was sworn to that the actions were brought for the benefit of the attorney.—**BAYLEY B.** There is no instance of this motion being granted on account of a *qui tam* plaintiff being in indigent circumstances. That so frequently happens, that acts of parliament would have been rendered nearly inoperative had such security been required. Rule refused.

Security for costs will not be required where the plaintiff, being in indigent circumstances, sues *qui tam* in several actions, his brother-in-law being attorney in them.

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**WIGLEY** *against* EDWARDS.

**PROCEEDINGS** had been taken on the bail-bond because the notice of bail did not state that the "bail-piece and affidavit of caption had been filed with the filacer at the proper office," the cause being a town cause. A rule having been obtained to set aside the proceedings for irregularity, cause was shown that the above words were necessary in a notice of bail in this court. Appendix to *Dax's Practice*, 2d edit. cxvii. For the bail it was contended, first, that the notice was correct; secondly, that informality in the notice of bail did not entitle the plaintiff to take an assignment of the bail-bond; *Rex v. Sheriff of Middlesex in Duncombe v. Crisp (a)*.

A notice of bail need not state that the bail-piece &c. has been filed with the filacer at the Exchequer office.

An informality in a notice of bail does not entitle the plaintiff to take an assignment of the bail-bond.

*Per Curiam*.—It appears to us to be entirely un-

(a) *Ante*, Vol. III. 440.

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necessary to state that the bail is filed with the filacer. In the King's Bench bail is filed at the chambers of some judge of the court. In this court it is taken away and filed with the filacer in the Exchequer office. Then, as in the King's Bench it is never stated to be filed with the particular judge, that being implied, there is no reason why it should be necessary to state it here. However, we rest our decision on the case cited. In future we shall not consider it necessary that the statement of the place where the bail is filed should form part of the notice of bail.

Rule absolute with costs (a).

(a) See *Bell and another, Assignees of the Sheriff of Middlesex, v. Foster and others*, 8 Bing. 334. Objections to notices of bail should be made when the bail appear.

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NORTHWAITE, Executor &c., *against* BENNETT.

A churchwarden cannot, by ordering repairs to be done to a parish church, render his co-churchwardens liable without their consent, and if he does, he is personally liable.

**A**SSUMPSIT for goods sold and delivered, and work and labour by the testator. Plea, non assumpsit, with notice of set-off for work and labour &c. done by defendant for testator. The defendant had repaired a parish church by order of the plaintiff's testator who was the acting churchwarden, and the work had been approved of by the vestry and part of the account paid. The question at the trial was, whether this work and labour &c. could be set off? Against the set-off, it was objected for the plaintiff, that the testator, if liable at all, was only liable jointly with the other churchwardens. *Bayley* B. before whom the cause was tried, held the testator personally liable, there being no evidence that the other churchwardens knew of the order or had

authorized the plaintiff's testator to act for them. The set-off being proved, and exceeding the balance claimed by the plaintiff, he was nonsuited, with leave to move to enter a verdict.

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*Petersdorff* moved accordingly. The defendant's right to recover for his work was against all the churchwardens, the work being one which they were collectively liable to do under pain of ecclesiastical censures. The demand being joint could not be set off. Their liability is quâ corporate body; *Wormwell v. Hailstone* (a). [Bayley B. The plaintiff's testator was not bound as churchwarden to do the repairs on credit (b)]. In case of accident, immediate repairs may be requisite before a rate can be raised.

LORD LYNTHURST C. B.—The plaintiff's testator here employed the workmen on his own authority, nor does it appear that he ever communicated with the other churchwardens. No fund appeared to exist at the time out of which the repairs might be paid for. I question if a churchwarden is bound to incur responsibility by putting a church in repair if the parish do not previously supply him with funds for that purpose. The plaintiff's testator therefore was personally liable for the work which he ordered (c).

BAYLEY B.—I nonsuited the plaintiff considering the subject-matter of set-off to constitute a separate demand against his testator, he having ordered the

(a) 6 Bing. 668. See *Prideaux's* Directions to Churchwardens, 8th ed. by Tyrwhitt. Index, tit. Corporation.

(b) The regular way is to raise the money by a rate before incurring expenses. See 12 East, 538, and other cases collected, *Prideaux*, 108, n.

(c) See *Lanchester v. Tricker*, 1 Bing. R. 201; *Lanchester v. Frewer*, 2 id. 361, cited 3 Bing. 479; *Lanchester v. Thompson*, 5 Madd. R. 4.

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work. I thought the other two churchwardens not liable, because the plaintiff's testator was not shewn to have had any authority express or implied from them to incur the debt. I also thought it his duty to take care that he had funds in hand, and to pay ready money. *Wormwell v. Hailstone* was an action against a mere nominal defendant as clerk to the trustees, so that the whole question was, whether a person compelled to be a defendant ex officio by a statute could be made liable to a fi. fa. de bonis propriis. It is probable that it would be a good answer for a churchwarden to a libel in the spiritual court for not repairing a church, that he was not bound to use his own money, and had taken steps to get a rate paid, but without success. Here, it did not appear that the plaintiff's testator communicated the fact of this order to his co-churchwardens.

*Per Curiam.*—Rule refused.

### JONES *against* KEY.

A defendant being under terms to "re-join gratis," need not join in demurrer within 24 hours after demand of joinder in demurrer.

THE plaintiff being under terms to rejoin gratis, had not joined in demurrer within 24 hours after joinder in demurrer had been demanded. The plaintiff gave no rule to join in demurrer, but signed judgment, which a baron by order had set aside for irregularity. On motion by *Mansel* to rescind that order, the court said, The master reports to us that rejoining gratis does not extend to a joinder in demurrer where the issue is tendered in law, for he may join issue to the country without the consideration that is necessary to joining in demurrer. Nor does "rejoin" apply to joinder in demurrer. Rule refused (a).

(a) See *Clark v. Adams*, Vol. II. 753.

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KIRBY *against* ELLIER.

**A**N order had been made at chambers against the plaintiff's consent to stay proceedings on payment of debt and costs by monthly instalments, plaintiff to have execution for the whole on default of any one payment. The plaintiff delivered a declaration, treating the order as a nullity. On motion to set aside the declaration with costs, the court said, that a judge at chambers could at most only stay proceedings on payment by the defendant of the debt and costs in the time he would have had to do so by law. Though by this order some money was paid before the plaintiff could have obtained it by law, the final discharge of the debt was postponed for months. The defendant having given up the costs under the second order, the action was settled. *Chilton* for, *Platt* against the rule.

Though a judge at chambers may make an order for staying proceedings on payment of debt and costs, he cannot order payment by instalments, nor give the defendant more time than he would have had by law.

LARDNER *against* DICK.

**C**ASE for injury to plaintiff's reversion. The declaration contained nineteen counts; ten stating the possession to be in the plaintiff, and the other nine in his tenants (a). The plaintiff had a verdict on three counts. The defendant had a verdict on the rest. The *Master* having allowed the plaintiff his general costs minus the costs of the issues, found for the defendant, without allowing the defendant the costs of witnesses called as well to disprove the issues found for plaintiff as to prove them found for defendant. *Jervis* moved for a rule to review the taxation, on affidavit that

By the proper construction of *Reg. Gen. Hil. 2 Will. 4. No. 74.*, a defendant is not entitled to the general costs of issues found for him, including the witnesses, or to the costs of witnesses whose testimony was only in part applicable to those issues; but the plaintiff

(a) See *Martin v. Goble*, 1 Camp. 320.

has a right to the general costs in respect of the issues found for him.

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all the defendant's witnesses were necessary to prove the issues on which he had succeeded, and that the testimony of two of them applied principally to those issues, and not materially to those found for the plaintiff. He claimed for the defendant the general costs of the cause on all the issues found for him, including the expense of witnesses.

BAYLEY B.—Before it was ordered by *Reg. Gen. Hil. 2 Will. 4. No. 74. Vol. II. 347.* “that no costs shall be allowed on taxation to a plaintiff on any counts or issues on which he has not succeeded, and that the costs of all issues found for the defendant shall be deducted from the plaintiff's costs, there could not have been a pretence for this motion; and I think the *Master* has put the proper construction on that rule.

Rule refused (a).

(a) See *Cox v. Thomason*, ante, Vol. II. 411.

### DUCKETT *against* WILLIAMS.

Before effecting a policy of life insurance, a declaration and statement of health, freedom from disease, &c., was signed by the assured. By one clause “if any untrue averment” was contained therein, or if

PREVIOUS to making the insurance for the life of one *Stevenson*, which formed the subject of this action, the following declaration and agreement had been signed on behalf of the plaintiffs (a):

“We *S. B. M.* and *G. D.*, trustees of the *Provident* life-office, do hereby declare and set forth, that *J. Stevenson* is now in good health and has not laboured under gout, dropsy, fits, palsy, insanity, affection of the

(a) The action was by the *Provident* life-assurance company against the *Hope* insurance company. the facts required to be set forth in the above proposal were *not truly stated*, the premiums were to be forfeited and the assurance to be void: Held, that as the health &c. of the party whose life was insured was *untrue*ly stated, though not to the knowledge of the party making the declaration and statement, the premiums &c. were forfeited, and could not be recovered back.

lungs or other viscera, or any other disease which tends to shorten life, and that his age does not exceed 41 years: that we have an interest in his life to the amount of 5000*l*. And we agree that the declaration or statement hereby made shall be the basis of the agreement between us and the *Hope* insurance company; and that if any 'untrue averment' be contained herein, or if 'the facts' required to be set forth in the above proposal be not 'truly stated,' all monies which shall have been paid on account of the assurance made in consequence hereof shall be forfeited, and the assurance itself be absolutely null and void."

On the first trial the life was found not insurable, and the court sustained the verdict on a rule to set it aside as against the evidence. It having been agreed to try a second action in order to settle whether the plaintiff was entitled to recover the premiums paid, the jury then found the life was insurable, and gave a verdict for the plaintiffs. A rule for a new trial having been obtained and argued in a former term by the *Solicitor-General* (Sir *John Campbell*) and *Kelly* for the plaintiffs, and by *F. Pollock* and *R. V. Richards* for the defendants, it was left by consent to the court to form their own conclusion on the facts and on the meaning of the agreement.

*Cur. adv. vult.*

Lord *LYNDHURST* C. B. now delivered the judgment of the court in nearly the following terms:—This was an action on a policy of insurance on the life of *John Stephenson*. On his death an action was brought to recover the amount of the sum insured. The defendant's case was, that at the time the insurance was effected the life was not insurable, and they obtained a verdict which the court did not think it right to disturb. However, on discussing the rule for a new trial, it was urged that the plaintiffs were entitled to a return of

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the premiums if the life was not insurable; but it turned out that that return had not been claimed at the trial. It having been subsequently agreed that that question should be tried in another action the plaintiffs had a verdict, but it was arranged, on motion for a new trial, that the court should look into the agreement and the rest of the evidence, and form their own conclusion as to the matters of fact. We have done so, and are of opinion that at the time when the policy was effected Mr. *Stevenson* had on him a disease tending to shorten life. The consequence is, that the facts set forth in the proposal were "*not truly*" stated within the meaning of the declaration and agreement, and the question entirely turns on the construction of that declaration and agreement made by the assured before the policy was effected. For the plaintiffs, it was urged that the words must mean "*truly*" or "*untruly*" within the knowledge of the party making the statement; and that if the insurer ignorantly and innocently makes a misstatement, he is not to forfeit the premiums under the clause in the agreement. But that appears to us not to be the real meaning of the words. A statement is not the less "*untrue*" because the party making it is not apprised of its untruth, and when we look at the context we think it clear that the parties did not mean to restrict the words in the manner contended for. Two consequences are to follow if the statement be untrue, first, that the premiums are to be forfeited; the other, that the assurance is to be void. Now if the statement were untrue within the knowledge of the party making it, the assurance would be void without any such stipulation. The knowledge of the party is clearly immaterial as to this last consequence, and must therefore be so as to the first, for we should violate all the rules of construction by holding it material as to one consequence and not as to the other. Our opinion

therefore is, that these premiums are forfeited under the clause in question. A nonsuit must be entered.

Rule absolute accordingly.

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BRAINE Assignee *against* HUNT and Another.

ON the first day of the term *Cooper* on behalf of the sheriff of *Oxon* moved for the usual rule to stay proceedings under the interpleader act, 1 & 2 *Will.* 4. c. 56. s. 6., on an affidavit that he had seized certain goods of the defendant which were in his possession, and that a claim had been made to them.

George interposed by moving for an attachment against the sheriff for not returning the *fi. fa.*, and stating that the plaintiff had had no notice of the claim by a third party to the goods in the sheriff's hands, or that the latter intended to move under the act.

The court refused to grant the attachment until it was ascertained whether or not notice of the claim had been given to the execution creditor before instructions were given to move for the attachment. No affidavit having been produced that such notice had been given, the court on a subsequent day refused the attachment and granted *Cooper* his rule, on the terms of payment by the sheriff of the costs of the motion for an attachment.

Miller appeared for the claimant.

W. H. Watson for the execution creditor. The sheriff's officer gave up to the claimant, under a bill of sale, all the goods he had seized except a fly carriage.

Cooper in support of the rule. It does not appear that the fly was not sufficient to satisfy the execution, nor does collusion appear.

If a sheriff hands over any goods seized under a *fi. fa.* to a claimant, a stranger to the execution, he is not entitled to protection under 1 & 2 *Will.* 4. c. 58. s. 6.

If notice of a claim by a third party and of the sheriff's intention to move under stat. 1 & 2 *Will.* 4. is not given by him to the execution creditor before instructions given by the latter to move for an attachment for not returning the writ, the attachment will be granted.

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and Another.

BAYLEY B.—To entitle himself to our interference the sheriff ought to remain indifferent, and not collude with either party (*a*). The object of the act was, that to try the property in the goods taken in execution, there should be only one cause, in which the parties interested should be the only litigants, and that the sheriff should be then exonerated. In the proper course the claimant might have sued the plaintiff to try the right to all the goods (*b*); but here, many articles which were in this case taken in execution at the plaintiff's suit, have been handed over by the sheriff's officer to the claimant. The result of which is, that the plaintiff will be driven to an action against the claimant for the goods taken by him, and against the sheriff for those still in his possession. The act of giving up part of the goods has defeated the object of the act as much as if all had been so given up, and is strong evidence of collusion with the claimant. Nor can we assume that the article remaining in the sheriff's hands would satisfy the debt. The case does not come within the act. The rule must be discharged with costs; but the sheriff may have ten days to return the writ.

(*a*) See *Cook v. Allen*, ante, Vol. III. 588.

(*b*) See ante, 231.

SAUNDERSON against BELL.

SAME against SAME.

Where a mortgage deed was delivered to a party as evidence of his title to apply for payment of


VERDICTS were taken for the plaintiff in both actions, subject to a reference by order of nisi prius. The award stated the following facts for the opinion of the court :

principal and interest due thereon, no lien attaches on the deed in respect of his work and labour in so applying; for the value of the article deposited is not increased by any work done on or with respect to it.

Payment to an apprentice in his master's counting-house will bind the master if made in the usual course of mercantile business, and in discharge of a commercial debt; but such a payment of money, if made to him on another account, as *e. g.* by a stakeholder of a sum to be deposited with him, will not. *Comm. semb.*

As to the first of these causes the facts are as follows: The action was in trover for a certain deed of mortgage belonging to the plaintiff bearing date the 24th day of *February* 1825. The parties to the said deed were the said plaintiff *M. Sanderson* of the one part, and *J. Rummens* of the other part, and the said deed was made and entered into for the purpose of securing payment to the plaintiff by *Rummens* of the sum of 100*l.* and interest on 24th *February* 1826. In *October* or *November* 1831, the said mortgage deed was delivered by the plaintiff to the defendant, who then was and still is an auctioneer and appraiser, for the purpose of recovering the principal money and interest due upon the mortgage. No specific agreement or bargain was made for the defendant's remuneration, nor was there any agreement that the defendant should have a lien on the deed. The defendant made application to *Rummens* for payment of the principal and interest due upon the mortgage, and he also made similar application for payment on the mortgaged premises, and to a person who acted as receiver for *Rummens* of the rents of the mortgaged and other premises, and all such applications were made long before the commencement of the action. The defendant did not however by such applications obtain payment of the principal and interest due on the mortgage, or of any part thereof. The defendant had no authority to employ an attorney to enforce payment. The deed was duly demanded of the defendant before the action was brought, and he refused to give it up, insisting that he had a lien upon it for his charges in and about the above applications for payment. The plaintiff charged two guineas, which is a reasonable sum, supposing he is entitled to make any charge. If upon the above facts the court shall be of opinion that the defendant is entitled to make the said charge, and that he has a lien for the same on the

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said mortgage deed, then I do award that the verdict entered for the plaintiff be set aside, and that a verdict be entered for the defendant; but if the court shall be of a contrary opinion on either point, then I do award that the verdict already entered for the plaintiff do stand, but that the damages be reduced to one shilling upon the defendant delivering up or causing to be delivered up the said deed to the said plaintiff.

As to the second cause, I find that the facts are as follows: The action was brought to recover from the defendant the sum of 13*l.* 11*s.* 4*d.* for keep of certain horses of defendant at livery, and for goods sold and delivered by plaintiff to him, and for money paid by the plaintiff for the defendant's use. The declaration was in indebitatus assumpsit, and contained counts applicable to the recovery of the plaintiff's demand. The defendant pleaded the general issue with notice of set-off, and delivered particulars of his set-off to plaintiff's attorney, in which particulars was an item, the only one in respect of which any set-off was claimed, of 50*l.* for money had and received by the plaintiff to and for the use of the defendant. The plaintiff established his right to a verdict for the sum of 12*l.* 16*s.* 4*d.* unless the defendant is entitled to set off the sum of 50*l.*; as to which claim of set-off I find that on the 28th *March* 1831, the following agreement was entered into at plaintiff's house between the defendant and one *Bardell*.

“*March* 28th 1831.

“*Mr. Bell* bets *Mr. Bardell* that he drives his mare in harness from opposite the *Horse Guards Gate, Westminster*, to *Mrs. Bryerley's, the Gloucester Hotel, Brighthelmstone*, and back again to the same place opposite the *Horse Guards, Westminster*, within the time of twenty hours. The match to be done within fourteen days from this day; the distance is to be performed in twenty successive hours from the time of

starting. The wager is for 50*l.*, and the money is to be paid into Mr. *Martin Sanderson's* (the plaintiff's) hands within five days from this day: if either does not pay the full sum to him within that time, the 5*l.* now put down by each to be paid to the one that does put into his (Mr. *Sanderson's*) hands the 50*l.*

H. Bell.

John Bardell."

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&
BELL.*

At the time of the said agreement being entered into, or in a few days afterwards, the said *J. Bardell* and the defendant, pursuant to the said agreement, paid to the said plaintiff *M. Sanderson*, as the stakeholder named in the said agreement, 50*l.* a-piece. No evidence has been offered before me by either party to show what was done under the said agreement towards determining the bet; nor has it been proved that prior to the plaintiff's action the repayment of the 50*l.* deposited by the defendant with the plaintiff as aforesaid, was ever demanded by the defendant, or by any on his behalf, from the plaintiff, and it is admitted that the defendant has no evidence to prove any such demand; but it appears that in consequence of disputes between *Bardell* and the defendant on the subject of the wager, the plaintiff determined to pay back to each party the 50*l.* which each party had deposited in the plaintiff's hands as before mentioned, and that in consequence of the plaintiff's determination, and after a communication by letter that the deposit would be paid back if the wager was not settled in a week. On 21st *June* 1831, before the action was brought, the plaintiff paid back the said sum of 50*l.* which had been deposited by the defendant in the manner following; that is to say, the said sum of 50*l.* was paid by one *Anne Sanderson*, the plaintiff's sister, by desire of the plaintiff, to one *C. Bowser*, at the counting-house and usual place of business of the defendant in *Oxford Street*, in the

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county of *Middlesex*, and the said *C. Bowser*, at the time of payment, gave a receipt for the same in the words and figures following :

"Memorandum.

"Received of Miss *Sanderson* 50*l.* deposit of wager,
 21st *June* 1831. *C. Bowser.*"

And I find that at the time of the payment of the said sum of 50*l.* to the said *C. Bowser* as aforesaid, he the said *C. Bowser* was in the defendant's service as an apprentice, but no proof has been given by the plaintiff to show that the said *C. Bowser* had any direct authority from the defendant to receive the said sum of 50*l.* on his account, nor has it been shown that the said sum of 50*l.* did in point of fact ever come to the hands of the defendant. If, upon the facts stated, the court shall be of opinion that the defendant was entitled to set off the said sum of 50*l.* against the amount of the plaintiff's claim, then I award that in the said second cause a verdict be entered for the defendant; but if the court should be of a different opinion, then the verdict already entered for the plaintiff is to stand, but the damages are to be reduced to the sum of 12*l.* 16*s.* 4*d.*

A rule having been granted for suffering the verdicts for the plaintiffs to stand, and for reducing the damages to one shilling in the action of *trover*, and to 12*l.* 16*s.* 4*d.* in the action of *assumpsit*,

Platt showed cause. The defendant is entitled to verdicts in both actions. As to the first, the mortgage deed deposited with him was subject to a particular lien for his endeavour to recover the principal and interest thereon; for services done in respect of that article, though not upon it, are sufficient for that purpose. In *Blake v. Nicholson* (a), *Franklin v. Hosier* (b), *Chase v. Westmore* (c), and *Hollis v. Claridge* (d), *Gibbs J.*

(a) 3 M. & S. 167.

(b) 4 B. & Ald. 341.

(c) 5 M. & S. 180.

(d) 4 Taunt. 807.

held that every one, whether attorney or not, has by the general law of the land a lien on the specific deed or paper delivered to him to do any thing on. As to the second cause, the defendant was also entitled to set off the 50*l.* deposited in the plaintiff's hands, as he might have recovered it back as money had and received to his use; *Lacaussade v. White* (a), *Cotton v. Thurland* (b), *Bate v. Cartwright* (c), *Smith v. Bickmore* (d). For a wager that the plaintiff could perform a journey against time on the king's highway is illegal, whether to be done in a carriage, *Ximenes v. Jaques* (e), or on horseback, *Whaley v. Pajot* (f). [Vaughan B. That race was for more than 50*l.*, and would have been legal on the turf.] The plaintiff's promise by letter to return the deposit if the wager was not decided within a week, waived any necessity for a demand. The apprentice *Bowser* not being shown to have authority to receive money on the defendant's account, payment to him is not payment to the defendant.

Adams Serjt. in support of the rule. The plaintiff does not appear to have reaped benefit from the defendant's applications for the mortgage money, and gave no authority to him to proceed by other means, if he did not succeed in obtaining it. Then he is not liable to the defendant for work and labour, and if he was, no work having been done on the article, the defendant could not have a lien. That appears by the cases cited. The judgment of *Gibbs J.* in *Hollis v. Claridge* was only intended to apply between parties who would have been liable had the work been done. In *Wallace v. Woodgate* (g), *Best C. J.* held, that a livery-stable keeper had no lien on horses for their

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(a) 7 T. R. 535.

(b) 5 T. R. 405.

(c) 7 Pri. 540.

(d) 4 Taunt. 474.

(e) 6 T. R. 499.

(f) 2 B. & P. 51.

(g) Ry. & Moody, 193.

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keep unless by special agreement; and his decision in *Bevan v. Waters* (a) that a trainer had a lien on a race-horse for his charge in training him, turned on the old acknowledged common law principle, where the bailee expends labour and skill in the improvement of the subject delivered to him, or, to use the words of Lord Lyndhurst in *Judson v. Etheridge* (b), "in altering the character of the horse so as to put him into condition to run at races." As to the payment to the apprentice, he could not be found to be produced before the arbitrator; but the payment to him was good, having taken place at the defendant's counting-house and usual place of business, and not being repudiated by the apprentice for want of authority to receive it. In *Barrett v. Deere* (c) payment to a person found in a merchant's counting-house, and appearing to be intrusted with the conduct of the business, was held good payment to the merchant, though it was distinctly proved that he had never employed the person or received the money. The real ground of that decision was, that the debtor has a right to suppose that the creditor, a tradesman, will not allow persons to come on his premises and there intermeddle with his business without his authority. [Bolland B. Must not the test of the payment at a tradesman's counting-house being good or bad depend on whether it takes place in the course of business? Can a payment of a sum to a shopman or to a clerk at a counting-house, and not being in the common course of commercial business, *e. g.* a legacy or a mortgage debt due to the principal, be binding on the latter?] *Wilmot v. Smith* (d) decided, that where a person in the

(a) Moody & M. 235. See also *Jacobs v. Latour*, 5 Bing. 130.

(b) *Ante*, Vol. III. 958.

(c) Moody & M. 200. *cor.* Lord Tenterden. See *Moffatt v. Parsons*, 5 Taunt. 307.

(d) Moody & M. 236.

office of the plaintiff's attorney, on being referred to by another clerk in the office to whom tender had been first made, and rejected by him on the ground of want of authority to act, refused to receive the sum, not from want of authority, but on account of its being too small; the tender was good, though it did not appear who the person was. A demand that the money deposited should be returned was necessary before it could be sued for or set off. [*Bayley B.* It was received by the plaintiff ab initio to the use of defendant. But here it was to be paid over within fourteen days; it is not then a fresh subject of demand, and after that time had elapsed the defendant held it for the plaintiff's benefit. Then it might have been recovered in an action which in itself would be a demand, and so is a set-off.] The stakeholder was entitled to notice that the time was passed and the wager was not, nor would be decided. [*Bayley B.* The match was to be done within fourteen days from the date of the agreement.]

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BAYLEY B. having stated the terms of the motion, proceeded thus:—As to the action of trover, if the defendant had a lien on the subject-matter of the action, the verdict must be entered for him; if he had not, there must be a verdict for the plaintiff with one shilling damages. The facts of that case were, that the plaintiff having a mortgage deed on which money was due, put it in the hands of an auctioneer in order to receive the principal and interest. It was not shown that he was to do anything with it except giving it to the mortgagor, to show that he had title to require payment from him. Nor did it appear that he did anything else upon or in relation to the instrument. Now, where a party insists on a lien, the onus is on him to show his right to it. A right to lien may exist by the usage of trade or by special con-

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tract, and there is another sort of lien where a man possessed of the article on which work is to be done by him does that work on it. Of that class of liens is *Chase v. Westmore* (a), where a miller, who by agreement with the owner, had bestowed labour in grinding corn at a fixed price per load, was held entitled to detain it until the price was paid. The question there was, whether the special bargain for the price of grinding superseded the lien which originally existed. The court held that it did not, and that the defendant might accordingly detain the corn until the fixed price was paid. But that was a case in which work was done on the article forming the subject of the action of trover. Here, no such work was done on the mortgage deed, which was merely placed in the defendant's hands to be exhibited to the mortgagor as the defendant's authority to receive the money due upon it. No authority goes so far as to decide that that would vest a right of lien in the defendant: and the cases of *Wallace v. Woodgate*, and *Bevan v. Waters*, appear to me, by pointing out the true distinction, to show that the present is not a case in which the right of lien exists. For in the first case the lien was not allowed, the livery-stable keeper having done nothing for the horse but finding food for him; whereas in the second it was allowed to the trainer, who had bestowed his labour and skill on him in getting him into running condition, and probably claimed nothing but for that training. Had the livery-stable keeper in *Wallace v. Woodgate* also trained the horse, and his claim on that account could be separated, there might be some right of lien; but as a compound claim for feeding and probably for dressing him was set up, his claim to lien, if any, was entire, and must necessarily be established or fail for both charges. In my opinion,

(a) 5 M. & S. 180.

then, this case does not fall within the class in which the defendant proposes to include it.

On the question in the action of assumpsit, I am of opinion that the defendant made out a sufficient *prima facie* case in order to establish his right to have the money returned to him. No demand was necessary to be relied on in order to vest the defendant's right of insisting on a set-off. The true question was, whether the plaintiff was indebted to the defendant at the time of commencing the action? Now the money was deposited with the plaintiff to be paid over by him to either the defendant or *Bardell*, if the race took place within fourteen days. As soon as that time elapsed without the race having been run, the plaintiff held that money for the use of the defendant only. The insisting on it, as an item of set-off is equivalent to an action brought for it. Whether the money has been paid to the defendant is another question, as to which, for the sake of justice, we will arrange an inquiry. At present no sufficient authority to *Bowser* to receive this money is shown on the award. An authority to receive money in the course of business may perhaps be presumed from his situation of apprentice in the plaintiff's house. But we cannot extend that presumption to payment of money in transactions which, like the present, are out of the ordinary course of the master's business. The verdict in the first cause must stand, the damages being reduced to one shilling, and the second cause should be sent back to the arbitrator, in order that the defendant may be personally examined as to having received the 50*l.* paid to *Bowser*.

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BOLLAND B.—I quite agree in opinion on the second cause, for the reasons I have before stated. On the action of trover, I am clearly of opinion that no lien can exist; for if this were a particular lien, as argued, we

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should look in vain for a general one; for whenever it was found that work had been done on a chattel, that would raise a specific lien thereon. That lien would attach in every single instance in which one man employed another to do work in respect of an article deposited with him. But lien attaches on a chattel where the work is to be done on it to improve it or increase its value and capability for its particular uses, but no such right can exist where it is merely delivered as evidence of the bailee's title to demand money on it. The trainer of a race-horse exercises a peculiar skill, and if he does not absolutely create, brings fresh powers into action in the animal placed under his care. His claim to lien therefore stands on very different ground from that of the livery-stable keeper who only feeds and dresses him. Those cases then show where this sort of lien begins and where it ends.

GURNEY B. concurred.

Rule absolute. The verdict for the plaintiff in the action of trover to stand, and the damages to be reduced to one shilling. And in the action of assumpsit the defendant to be personally examined before the arbitrator as to the payment of 50*l.* to *Bowser* his apprentice, and to produce his books at the same time, the arbitrator to report to the court. The costs of that meeting to be paid by the plaintiff.

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WHATLEY *against* MORLAND.

AN arbitrator appointed by order of nisi prius, being attended by counsel on behalf of the plaintiff, was applied to by the defendant to adjourn in order to give time to instruct counsel on his behalf, but the plaintiff would not consent unless the defendant would pay the costs of that meeting. The defendant having delivered a written protest, the arbitrator proceeded *ex parte*, and certified that a verdict should be entered for the plaintiff. A rule having been obtained to stay or set aside the certificate, on the ground of the plaintiff's having attended the arbitrator by counsel without giving distinct notice to the defendant of his intention, cause was shown, first, that the rule did not state the grounds of objection, citing *Watkins v. Philpotts* (a); and secondly, that in certain conversations between the parties sufficient notice of the plaintiff's intention to attend by counsel had been given to prevent any surprise on the defendant.

A rule to set aside the certificate of an arbitrator should state the grounds of the motion. Where a plaintiff who did not give distinct notice of attending an arbitrator by counsel, attended by counsel, and refused to consent to an adjournment except on defendant's paying the costs of the meeting, the court held plaintiff not entitled to such costs, stayed the certificate made by the arbitrator in his favour, and referred the case back to the arbitrator.

Per Curiam.—The grounds of the application should have been stated in the rule to show cause, but that might be amended and is not insisted on here. If notice of attending by counsel is not given, one party might obtain an undue advantage over the other. Distinct notice therefore from one attorney to the other was necessary, and such notice from a mere witness for the plaintiff is not sufficient. The plaintiff was therefore not entitled to the costs contended for.

(a) *M'Clell. & Y.* 394; 11 *Pri.* 57. *S. C.* See same rule in *K. B.* *E.* 1821; 4 *B. & Ald.* 497; *Tidd*, 9th ed. 844.

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Rule absolute without costs; the defendant consenting to enlarge the time for making the award (which had expired) until the first day of *Easter* term; the certificate to be stayed and the cause referred back to the arbitrator. The costs of the motion not to be costs in the cause. *Humfrey* for, *J. D. Whatley* against the rule.

BEST, Assignee of THOROWGOOD an Insolvent, *against*
ARGLES.

T. being indebted to defendant in about 150*l.*, a legacy of 100*l.* was left to his wife, whereupon T. and his wife signed and sent the following instrument to defendant:—
“We hereby authorize the executors of the late Captain A. to pay you any legacy or monies that he may have bequeathed to us or either of us, in part payment of the various sums you have so

ASSUMPSIT for money had and received, with a plea of non assumpsit, tried in *London* at the sittings after *Trinity* term 1833, before *Gurney B. Captain Argles*, who died in *July* 1831, bequeathed a legacy of 100*l.* to the wife of *Thorowgood*, who being then indebted to the defendant in about 150*l.*, sent him the following instrument in a letter:—

“We hereby authorize the executors of the late Captain *Argles* to pay to you any legacy or monies that he may have bequeathed to us or either of us in part payment of the various sums you have so kindly lent us, and your receipt shall be to them a sufficient discharge for the same. There appears to be about 150*l.* due to you.

“10th *July* 1831.

(Signed) *J. H. Thorowgood,*

To Mr. *Argles*.

Cath. Thorowgood.”

kindly lent us, and your receipt shall be to them a sufficient discharge for the same. There appears to be about 150*l.* due to you.” Defendant communicated to the executor his claim to the legacy before T. petitioned for his discharge under the insolvent debtors’ act, but the executor then said he would pay the legatee. Before T. was discharged the executor paid her legacy to T.’s wife, which she immediately handed to defendant: Held, that as it was doubtful whether the authority would operate in equity as an assignment to the defendant, divesting T. and his wife of all interest in the legacy, the interest in the legacy passed to the assignee of T. under the insolvent act.

The letter in which it was inclosed was as follows:—

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Dear *George*,

“Myself and *Kate* herewith send you an order to receive any legacy and monies there may be left to us by our dear departed uncle, in part payment to you for the sum due, although I fear it will not cover your demand against us: but you must take the will for the deed.

(Signed) *J. H. Thorowgood.*”

Before *January* 1832, the defendant informed the executor of Captain *Argles* that he had a claim on the legacy, but the executor said he would pay it to Mrs. *Thorowgood*, the legatee. On 28th *February* 1832, *Thorowgood* went to prison, and on the 29th filed his petition to be discharged under the insolvent act, 7 *Geo.* 4. c. 57., and made his assignment. On 23d *April* 1832, before he obtained his discharge, the executor of Captain *Argles*, attended by Mrs. *Thorowgood* and the defendant, paid the former 97*l.* for her legacy, having deducted the legacy duty. She directly paid it over to the defendant. The insolvent was discharged 19th *May* 1832. Upon this evidence the counsel for the plaintiff having admitted the transaction to be bonâ fide, urged, that as the executor had refused to assent to the authority given to the defendant by the insolvent and his wife to receive the legacy, that authority was revoked by the insolvent's assignment under s. 11 of 7 *Geo.* 4. c. 57., no actual transfer to the defendant by payment having then taken place. The learned baron having nonsuited the plaintiff, with liberty to him to move to enter a verdict for 97*l.*, a rule was afterwards obtained accordingly, and *Williams v. Everett* (a) was

(a) 14 East, 582.

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cited; *Bayley B.* saying, the question here is not whether the executor was bound by the authority in question, but whether the persons who gave it were so bound, and whether, if either of them received the money, it was not so received in trust for the defendant.

W. H. Watson showed cause. This being a *bond fide* transaction, the only question is, whether the instrument of 10th *July* 1831 operated as an assignment of the legacy? Now as by that instrument the insolvent and his wife stripped themselves of all interest in the legacy, and vested it absolutely in the defendant, whose receipt was to be the executor's discharge, no beneficial interest remained in the insolvent to be taken by the plaintiff under the insolvent act; and the authority, instead of being nakedly to receive, as it will be contended to have been, was coupled with an interest, and therefore, according to the known distinction, was irrevocable; then this authority, if irrevocable, was all the assignment of which the legacy was capable while it remained a chose in action, and vested all interest in it in the defendant. An order for payment of money out of a particular fund has always in equity been held to be an assignment. *Row v. Dawson* (a) is precisely in point. *A.* having borrowed money of *B.* gave him a draft on the deputy of *H. W.* "out of the money due to *A.* from *H. W.* out of the Exchequer," and became bankrupt; the draft was held an assignment of the fund *pro tanto*, and Lord Chancellor *Hardwicke* distinguished between an order on a particular fund and on funds generally, holding the former to be an assignment and the latter to be only a bill of exchange. That case has been followed by *Yeates v. Groves* (b), *Ex parte South* (c), and *Smith v. Everett* (d). In the latter case the lords commissioners *Eyre* and *Ashurst*

(a) 1 Ves. sen. 331.

(b) 1 Ves. jun. 280.

(c) 3 Swanst. 393.

(d) 4 Brown's Cha. Ca. 64.

ruled that an order to pay money out of a particular fund gave the party named in the order a specific lien thereon (a). [*Bayley B. In Row v. Dawson, Swinburne* the deputy suffered the order to be deposited; that was assent by the party who was to pay.] It is not put on the ground of assent by, but of notice to *Swinburne*. [*Bayley B.* He accepted the order and so virtually submitted to comply with it.] The assent by the holder of the sum formed no part of the decisions cited. Nor could it affect the question of assignment as between assignor and assignee. Now if this instrument divested all beneficial interest out of the assignor, there was nothing which by his subsequent insolvency would vest in his statutory assignee; *Winch v. Kasey* (b), *Carpenter v. Marnell* (c). In *Lewis v. Wallis* (d), a debt previously assigned to another for a valuable consideration, was held not to be attachable in the hands of the assignor. *Williams v. Everett* (e) has no application; first, because there was no privity between the plaintiff and the person holding the remittances under directions from their owner to apply part of them to pay the plaintiff, so as to support an action for money had and received to the use of the latter; and secondly, because the order to pay was not limited to any particular fund; a transfer of a debt being a chose in action not sufficient to enable the assignee to sue for it without a promise to him, viz. assent by the debtor. *Caron v. Chadley* (f) is of no consequence

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(a) So cited by *Alderson J., Crowfoot v. Gurney*, 9 Bing. 375.

(b) 1 T. R. 619.

(c) 3 Bos. & P. 40.

(d) *Sir Thomas Jones*, 222. Cited arguendo 14 East, 591, *Williams v. Everett*.

(e) 14 East, 582.

(f) 3 B. & Cr. 391. See also *Wharton v. Walker*, 4 B. & Cr. 163; *Israel v. Douglas*, 1 Hen. Bla. 239; *Swetes v. Hubbard*, 4 Esp. 903; *Taylor v. Higgins*, 3 East, 169; *Tallock v. Harris*, 3 T. R. 180; *Wilson v. Coupland*, 5 B. & Ald. 228; *Sprutt and others, Assignees, v. Hobhouse*, 4 Bing. 173. Also 8 B. & Cr. 395; 9 id. 474.

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here ; for after an order to pay, though before such an assent by the holder of the money as would render him liable as for money had and received to the holder of the order, the assignees of the latter, if he became bankrupt, could not recover. In the case of *Gibson v. Minet* (a), the Common Pleas held that an order by a customer on his bankers to hold him a sum from his private account to the disposal of third persons named, might be countermanded before it was acted on ; but that order was not restricted to a particular fund. Nor is there any case in which an order to pay a sum out of a particular fund of which notice has been given to the holder, has not been held to operate as an assignment from the date of it, irrevocable as between the parties. The assent of the executor was not necessary to give force to the previous assignment of the legacy, though the notice to him was proper in order to fix him with personal responsibility after knowledge of the transfer. *Fisher v. Miller* (b) is in point, this being an appropriation of a particular fund to the purposes of this order, and the court will recognize that the equitable interest had passed out of the insolvent to the defendant in due time, so as to prevent any right attaching in the assignees ; *Winch v. Keeley* (c), *Sumpter v. Cooper* (d). In *Crowfoot v. Gurney* (e), the bankruptcy of *Streather* was said to revoke his previous order to pay, but the court held otherwise ; and *Tindal* C. J. said, that the party in whose favour the order was made might have gone into equity to compel a formal assignment, and no answer could have been given to such application. *Carvalho v. Burn* (f) is not contrary, for the order of 11th April 1829, was made against all the goods in the hands of the agent *Rego*, who did not hand over any of them accordingly until 30th June 1829, after the act of bankruptcy.

(a) 2 Bing. 7.

(b) 1 Bing. 150.

(c) 1 T. R. 619.

(d) 2 B. &amp; Adol. 223.

(e) 9 Bing. 372.

(f) 4 B. &amp; Adol. 382, 386.

*Bompas* Serjt. and *Comyn* contrà for the plaintiff. This was an interest in the wife, which never having been reduced into possession could not pass by assignment. For had the husband died the instant after giving the authority, her right would have survived in preference to that of the defendant. [*Bayley* B. A husband may assign a wife's chose in action.] If this was an order to pay money out of a particular fund, it would be a bill of exchange requiring a bill stamp; *Emly v. Collins* (a). But this is a bare authority to receive the wife's money, which cannot vest it as by assignment until assented to. Suppose it were an assignment, no notice of it as such or in terms is given. In the equity cases cited the orders relied on as assignments were applicable to particular funds, and had been assented to. Here, so far from assenting, the executor says he shall pay it to the legatee, and is not proved to have had notice to the contrary. The common law cases of *Crowfoot v. Gurney* (b), and *Cuxon v. Chadley* (c), show that the assent of the holder of the property is necessary to the passing the interest to the assignee. Then this was a mere naked authority, and the insolvent's interest remained. A bill of exchange drawn in favour of the defendant and unaccepted, would not have divested the insolvent's property. In *Row v. Dawson* (d), not only was there a valuable consideration given by the holders of the order at the time it was given, but it was received and assented to by the agent who became bound to pay. The interest in the legacy could not have been recovered by any other but the insolvent. A doubtful equity will not be taken into account in a court of law.

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Cur. adv. vult.

(a) 6 M. & S. 144.

(c) 3 B. & C. 591.

(b) 9 Bingham. 372.

(d) 1 Ves. sen. 331.

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The judgment of the court was now delivered by

BAYLEY B.—In this case the question was, whether there had been such an assignment of the legacy in law or equity as deprived the plaintiff of his right, as assignee under the insolvent act, to demand payment of it to him by the defendant or the executor of Captain *Argles*? That question depends on the effect of the authority to receive it, coupled with the letter in which it was sent. We agree that if this was clearly an assignment in equity, so that the insolvent *Thorowgood* had become a mere trustee for the defendant, in whom the whole beneficial interest had vested, no interest could have passed from *Thorowgood* to his assignees on his discharge under the insolvent act, and his creditors would accordingly have no claim on the legacy. We must see then if any such trust really existed in the insolvent, for if only a case of doubtful equity appears, it must be left to the tribunals fitted to entertain such a question. First, the instrument purports to be a mere authority to the executors of Captain *Argles* to pay the legacy to the defendant. The executor is apprised that there is a claim by the defendant on the legacy, but distinctly replies that he shall pay it to the legatee Mrs. *Thorowgood*. Then he refuses to be bound or affected by the instrument in question. It did not purport on the face of it to be an *order* for payment out of the particular sum in his control; and if it had, an objection would arise on the stamp laws that a bill stamp would have been necessary (a). Nor was it an order on which new credit is given or a fresh advance made. Nor is it a power of attorney, for it does not contain the ordinary terms empowering the defendant to demand, receive, and *sue for* the legacy. It might be an authority to claim

(a) See 55 Geo. 3. c. 184. Schedule, tit. *Inland Bill of Exchange*.

and receive it binding in equity, but it is a mere authority not pledging the giver on the face of it that it shall be paid, but giving the executor a warrant, if he thought fit, to pay the money according to its direction. It might in a court of equity be held an authority conferring power to make or retain payment, but its terms are not so clear that we can take on us to say that it would certainly be the decision of a court of equity that the interest in the legacy passed to the defendant under it in such a manner that the assignee of the insolvent had no claim. If that court should so hold, they can stop the executor on their own authority. But looking at the decisions of those courts, there is nothing to justify us in concluding that *Thorowgood* and his wife pledged themselves that the legacy should be assigned to the defendant. In *Crowfoot v. Gurney* (a) the debtor was ordered to pay, and having assented to that order, became liable to pay accordingly; so that the right to sue the original debtor ended. In *Ex parte South* (b) also, the debtor acceded to the order, and thereby incurred a legal and equitable liability. So in *Row v. Dawson* (c), the instrument relied on was an order on a particular fund, on the credit of which money was advanced by the party to whom it was given as a security. In *Smith v. Everett* (d) there was a valuable consideration in work done, and the sub-contractor might be considered as entitled to have a part of the fund set apart for him as purchaser. But this instrument does not pledge the givers that the legacy shall be paid to the party in whose favour it was made. No new advance is made on it, nor is any consideration of forbearance suggested. To conclude then that this would in a court of equity be held to be an equitable assignment concluding the rights of the assignees under the insolvent act, would be to go beyond the province

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(a) 9 Bing. 372.

(b) 3 Swanst. 392.

(c) 1 Ves. sen. 331.

(d) 4 Br. Ch. Cas. 64.

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of a court of law. As the equitable rights are not clear, we shall in substance proceed as in *Carvalho v. Burn*, by leaving it to the defendant to establish them before the proper tribunal.

Rule absolute.

A stay of the *postea* was afterwards obtained until answer put in by the plaintiff to a bill in equity filed against him by the defendant.

WOODIN *against* BURFORD.

The warranty of a servant respecting whose authority from his master no more appears than that he was entrusted not to sell, but to deliver a horse, and to receive another with some money in exchange, pursuant to some previous bargain, the terms of which are not shown, will not bind his principal.

ASSUMPSIT against a horse dealer on the warranty of a horse. Plea: non assumpsit. At the trial before *Gurney B.* at the *Middlesex* sittings, the plaintiff produced the examination on interrogatories of one *Brampton*, defendant's servant, who had taken the horse to the plaintiff. Plaintiff then asked him what he knew about the horse; he answered, very little, the horse had just come up from the country and had a cough, but he the plaintiff could soon set that to rights. Plaintiff said he did not mind if it was only a cough, as he knew how to deal with it, and then read over and tendered to *Brampton* a receipt containing a warranty, which he signed. The horse soon after died of glanders. On this receipt being offered in for the plaintiff to prove the warranty, *Gurney B.* thought that *Brampton* was only authorized to deliver the horse and receive the money, and not to give a warranty, and nonsuited the plaintiff.

F. Pollock moved for a new trial, saying, that it should have been left to the jury to say whether *Brampton* had authority to give a warranty, and whether he had not informed the defendant of what he had done, so that the latter might be taken to have recognized the warranty given.

BAYLEY B.—The question is, whether or not the receipt signed by *Brampton*, the defendant's servant, with his declarations at the time he signed it, and delivered the horse to the plaintiff, is evidence to bind his master, the defendant. What is represented by a servant is not evidence against the master, unless the master's authority to make the representation appear. Here there was no evidence of any such authority. It is clear that before the delivery to the plaintiff of the horse in question, there had been a bargain between plaintiff and defendant for the exchange of horses, on the plaintiff also paying a sum of money to the defendant. Its terms do not appear; but it is clear, that all *Brampton* was to do was to take the defendant's horse to the plaintiff, bring back the other, and receive the difference. When he signed the warranty, he might have supposed his master to have stipulated for those terms at the time of the sale, and that he need not mention it to him again. Now, it appears to me, that a warranty by one not intrusted to sell (a), but merely to deliver the article warranted, and bring back the price, does not bind the principal, without showing an express authority to warrant given by the latter. The plaintiff did not in this case make out any warranty by the defendant himself, or that he had authorized his servant to do so.

VAUGHAN B.—It is quite clear that there was a previous bargain, and equally so that the servant was sent to the plaintiff merely to deliver one horse and take back another, without authority to warrant.

BOLLAND & GURNEY Bs. concurred.

Rule refused.

(a) *Secus*, had the authority been to sell the horses and receive the price, *Alexander v. Gibson*, 2 Camp. 555; *Helyear v. Hawke*, 5 Esp. N.P.C. 72; *Bank of Scotland v. Watson*, 1 Dow's Rep. in *Dom. Proc.* 45.

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WATSON *against* DELCROIX, Executrix.

Notice of inquiry may be stuck up in the office of pleas, and a copy left at defendant's last place of residence, by leave of the court, where the defendant had never been found to be served with the previous proceedings, and the persons resident at her last place of residence refused to say where she now resided.

THE defendant not having appeared to a writ of summons, a distringas was obtained, and an appearance entered under a judge's order, according to 2 W. 4. c. 39. A declaration was filed on 13 November, notice having been given by sticking up a copy in the office of pleas, and leaving a copy at the defendant's last place of abode, by leave of the court, under *Reg. Gen. Hil. 2 W. 4. No. 49. [ante, Vol. II. p. 346.]* Judgment was signed for want of a plea. *Butt* moved that service of notice of a writ of inquiry, by sticking it up in the office, and leaving a copy at the defendant's last place of abode, might be deemed good service, on affidavit that the present occupiers of the house refused to tell where the defendant was; and the court granted a rule accordingly, unless cause were shown in a week.

CULLUM *against* LEESON.

Affidavit of debt for so much money, "for money lent and advanced, and interest thereon," is bad.

Quere, is a defendant, arrested in a wrong christian name since S & 4 W. 4. c. 42. c. 11., entitled to be discharged on motion?

A Rule had been granted for discharging the defendant out of custody of the sheriff of *Staffordshire*; first, because he had been arrested by the name of *Henry Leeson*, a name by which he was not known, instead of *Thomas Henry Leeson*, by which name he was baptised: and secondly, because the affidavit of debt was for "920*l.* and upwards, money lent and advanced and interest thereon." Cause was shown, first, that as no doubt was suggested of the identity of the party, the defendant might have compelled the plaintiff to

amend the misnomer in the declaration, by inserting the right name, at his own costs, as provided by 3 & 4 W. 4. c. 42. s. 11.: secondly, that as by s. 28. of that statute, a jury may now allow interest on money lent, an arrest may be made for interest. In support of the rule, *Brooke and Another v. Coleman* (a) was cited, where all the judges were of opinion that the amount of the bill or note sued on should be specified, because part of the debt might consist of interest. That shows a plaintiff to have no right to arrest for interest, and excludes 3 & 4 W. 4. c. 42., from any operation.—The Court assented to the authority of the case cited, adding, that they were not aware of any decision that a party can be held to bail for interest; and that till 3 & 4 W. 4. c. 42., interest could not be recovered on money lent; and all that act does is to permit the jury to give interest, if they think fit. They finally made the rule absolute on the second point, without costs, doubting whether on the first they had power, since the statute cited, to interfere in a summary way, the party not being driven to a plea in abatement.

(a) *Ante*, Vol. III. 593.

STEPHENS *against* PELL.

TIME had been given to plead in a town cause on the usual terms, including that of taking short notice of trial. A demurrer to the plea having been

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notice of executing a writ of inquiry. When a defendant is entitled to fourteen days' notice of inquiry, and receives an eight days' notice only, he should return it immediately, in order to prevent expense; and where he did not do so, and let six days out of the eight elapse, before he gave notice of motion to set aside the proceedings for irregularity generally, without pointing out what it was, the inquiry was set aside, but without costs.

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allowed, notice of executing a writ of inquiry in eight days after it was served, was given and executed accordingly; notwithstanding two days before the execution the defendant had given notice, that if it was executed he would move to set aside the proceedings for irregularity, but did not state the irregularity. A rule was afterwards obtained accordingly, on affidavit that the defendant lived in *Northamptonshire*, sixty miles from *London*. The affidavits on the other side stated, that it was the practice for an attorney of a defendant residing more than forty miles from *London*, to return a too short notice of inquiry, that the defendant had not done so, and that the writ of inquiry was lodged, and the plaintiff's witness had come to *London* at the time the notice to stay proceedings was served. Also that the defendant's residence was not known to be forty miles from *London*. Cause was shown, that the order for time to plead on the usual terms compelled the defendant to take short notice of inquiry; that at all events he should have given notice to stay the proceedings before the inquiry was lodged, and the expense incurred; and should have disclosed the nature of his objection. To show that his not returning the notice was a waiver of the irregularity, *Rochfort v. Robinson* (a) was cited. In support of the rule it was said, that the defendant lived in *Northamptonshire*, more than forty miles from town, nor did the plaintiff show that at the time of serving the writ or notice he lived within that distance, but had since removed without giving notice to the plaintiff, so as to come within the case cited. Now by *Reg. Gen. Hil. 39 Geo. 3. (b)*, fourteen days' notice shall be given of executing writs of inquiry, where the venue is laid in *London* or *Middlesex*, and defendants reside above forty miles therefrom. The order

(a) 12 East, 427.

(b) Scacc. Manning's Exch. App. 224; 8 Pri. 503; Tidd, 9th ed. 577.

to take short notice of trial does not include taking short notice for executing a writ of inquiry. It does not appear the general practice to return short notices of inquiry; but if it be so, the plaintiff's previous irregularity was not waived by the defendant's neglect to comply with it.

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Per Curiam.—A party, under terms to take short notice of trial, is not also bound to take short notice of inquiry. By the general rule cited, the defendant was in strictness entitled to fourteen days' notice. Had the affidavit for the plaintiff stated in a satisfactory manner, that his attorney believed the defendant to have resided within forty miles, and that he had been served within that distance, that might have been such an excuse as would have enabled us to mark the irregularity with more lenity. The execution of the writ of inquiry should be set aside without costs, because the defendant, after receiving the notice of inquiry, should have given early notice of his intention to move in order to prevent further expense being incurred; but he gave no notice till two days before the inquiry was to be executed, and did not then state the nature of the irregularity. The master informs us, that if a party entitled to fourteen days' notice receives an eight days' notice, the usual course is to return it, as the place of his residence lies peculiarly in his own knowledge.—*Follett* in support of the rule, *Humfrey* against it.

Rule absolute without costs.

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JOHNSON *against* WELLS.

A motion for a new trial of an issue tried by a sheriff or other inferior judge, under 3 & 4 Will. 4. c. 42. s. 17. should be made on producing a copy of the sheriff's notes, verified by affidavit, or if the rule is granted, it will be discharged.

AN issue having been tried before the sheriff of London on a writ of trial under 3 and 4 Will. 4. c. 42. s. 17., the plaintiff had a verdict, and a rule for a new trial having been obtained on the notes of the secondary, certified by his seal, it was objected on showing cause, that the rule was not drawn up on reading any affidavit, which it was the practice to have in moving to set aside writs of inquiry: *Per Curiam*—The act cited does not place the sheriff of a county, or judge of a court of record for recovery of debt therein, to whom a writ of trial may be issued, in the situation of a judge of the superior courts, so as to enable a motion for a new trial to be made on the statement of counsel, as after a trial at nisi prius. He stands in the same situation as on the executing a writ of inquiry; he cannot give leave that a verdict shall be entered by this court for either party; the motion can only be for a new trial, and should have been made on an affidavit, verifying the under-sheriff's notes. No such affidavit appears here, nor any affidavit of the facts; but as this is a new act, and the defendant may have been misled, the sheriff may move again on proper affidavits, on payment of costs and bringing money into court. Rule discharged. *Stammers* for, *R. V. Richards* against the rule.

BOLLAND B. afterwards announced the resolution of the judges, that in order to save expense, motions for new trials of issues tried before the sheriff &c. should be made on producing a copy of the notes of the sheriff or other judge, verified by affidavit; and in *Hellings v. Stevens*, May 2, 1834, on showing cause against a rule

for a new trial after a trial before a sheriff, *Parke B.* confined *Archbold* to the sheriff's notes as verified by affidavit, without permitting him to go into facts stated in other affidavits.

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WELLS.

HILL *against* SALT.

THE declaration was in debt, stating a bond in the penal sum of 260*l.* Plea: non est factum. At the trial before the under-sheriff of *Staffordshire* the bond appeared to be in the penal sum of 200*l.* The under-sheriff refused to nonsuit the plaintiff for the variance. He was not applied to to amend the declaration, under 3 & 4 *Will.* 4. c. 42. s. 23. The plaintiff had a verdict, with leave to move to enter a nonsuit.

A bond in the penal sum of 200*l.* was declared on, as if the penalty had been 260*l.* Held, that the mistake might be amended under 3 & 4 *Will.* 4. c. 42. s. 23., and *semble*, by the sheriff trying an issue under a writ of trial.

Thesiger moved accordingly. This is a substantial variance, material to the merits of the case and prejudicial to the defendant in conducting his defence, for by it he may have been induced to plead non est factum. Then no amendment could take place under 3 & 4 *Will.* 4. c. 42. s. 23. Besides, as it is not clear that the power to amend extends to issues tried before the sheriffs, section 24. shows that he should have directed the jury to find the facts according to the evidence, and state them on the record, in order to the judgment of this court thereon.

Lord LYNDEHURST C. B.—The sheriff, instead of nonsuiting for this variance, should have amended the record; but it would be useless to the defendant to send down the case to a new trial, as the amendment would then be made.

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BAYLEY B.—The case is clearly within the spirit of sect. 23. and the amendment should have been made.

Rule refused (a).

(a) See *Waugh and others v. Bussell*, 2 Marsh, 214; 5 Taunt. 757, S. C.; *Ross v. Parker*, 1 B. & Cr. 358; *Coles v. Hulme*, 8 B. & C. 574.

JACOBS *against* HUMPHREY and Another.

The declarations of a sheriff's officer respecting goods seized by him under a *fi. fa.* in his possession at the time, are evidence against the sheriff, though made after its return day, and before any warrant issued by him to execute a *venditioni exponas*.

A sheriff must sell goods seized under a *fi. fa.* within a reasonable time, and before the return of a *venditioni exponas*, or will be liable to an action.

CASE against the sheriffs of *London* for negligence in not disposing of goods seized under a *fi. fa.* within a reasonable time. The declaration, after averring a judgment recovered, a *fi. fa.* issued and delivered to the defendants, and their return that the goods were unsold for want of buyers, averred the suing out a *venditioni exponas*, and that defendants did not within a reasonable time, or at any other time, expose to sale or cause to be exposed to sale the said goods &c., nor had they the money arising from the sale at *Westminster*, "&c., at the return day of the writ." The *fi. fa.* was issued 22d *May*, returnable 8th *June*, and defendants' officer levied. On 7th *June* the sheriff returned goods unsold for want of buyers, and on the same day a *venditioni exponas* issued, returnable next day. No sheriff's warrant to the officer to execute that writ appeared, but he did not give up possession till 10th *June*. It was proved that after the return of the *fi. fa.* and before service of the *venditioni exponas*, he admitted having seized to the full amount, but said that he would not sell, as defendants' attorney had undertaken to pay the demand. Verdict for the plaintiff for the sum indorsed on the writ, the subsequent expenses incurred by the plaintiff, and interest from the return of the

fi. fa., Gurney B. giving leave to move to enter a nonsuit.

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Talfourd Serjt. moved for a rule to enter a nonsuit or for a new trial, or in arrest of judgment. In order to recover in this action, the plaintiff should have ruled the sheriffs to return the *venditioni exponas*, *Moreland v. Leigh* (a). Were they even now ruled to do so, they could not plead to an action for a false return, the recovery of the full amount of the damages in this action. *Aireton v. Davis* (b) decided that a case lies against a sheriff before the return of the writ for not selling under a *fi. fa.* with reasonable expedition; but *Moreland v. Leigh* was not cited, and there were counts for a false return which would support that judgment. The declarations of the officer, after the return of the *fi. fa.*, were inadmissible in evidence; for that return dissolved his connexion with the sheriff. The sheriff was not liable for his acts, no warrant to execute the *venditioni exponas* having been issued to him.

Per Curiam.—The declarations of the sheriff's officer admitted in evidence, were made while the writ of *fi. fa.* was in the course of execution. Till the sheriff has made of the defendant's goods and chattels the money indorsed on the writ, the writ is running, and the relation of officer and sheriff continues while the goods are in the hands of the officer. The sheriff ought to act without a *venditioni exponas*, which is merely to produce alacrity when he delays or refuses to sell under the *fi. fa.* (c) The action is maintainable for the damages sustained by the plaintiff from the sheriff's failure to do his duty. He became agent of the

(a) 1 Stark. C. N. P. 388.

(b) 9 Bing. 740.

(c) See *Cameron v Reynolds*, Cowp. 406.

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plaintiff by the medium of the writ, and was guilty of neglect to sell before the *venditioni exponas*.

Rule refused.

REID *against* COLEMAN.

If one of the parties to a cause has the only copy of his agreement with his adversary, he should give him a copy, when applied for, without imposing terms, or a judge at chambers will compel him to do so.

THE defendant, plaintiff's landlord, held the only copy of the agreement of demise. Plaintiff repeatedly applied to him for a copy, which was refused, except on terms of admitting a tender, the handwriting of the parties, and consenting to a reference.

Knowles obtained a rule to show cause why the defendant should not deliver a copy at his expense to the plaintiff, and produce the original at the Stamp Office to be stamped, contending that the defendant ought to pay the costs, as plaintiff had given him notice of the motion, in case he would give a copy.

Alexander, in showing cause, said that the defendant would give the copy, but objected to pay the costs of this application.

Per Curiam—Those costs must be costs in the cause, for the defendant had no right to insist on those terms, and had the motion been made before a judge at chambers, it would have been granted as a matter of course. If we gave costs it would encourage parties to come to the court instead of the other less expensive remedy.

Rule absolute:

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ROHRS *against* SESSIONS.

COVENANT for breaches of covenants to repair, manure, &c., contained in the lease to the defendant of a farm near *Epping* in *Essex*. Venue, *Middlesex*. Before plea *Channell* had obtained a rule for changing the venue to *Essex*, and for liberty to plead in the meantime without prejudice to the rule. Notice had been given to the plaintiff that the motion would be made on special grounds. The affidavits stated the various farming covenants and breaches alleged, and that it would be necessary to call witnesses for the defence who lived near the demised premises; adding, that the questions in the cause could not be so satisfactorily tried by the class of persons usually constituting *Middlesex* juries, and could only be fairly tried in *Essex* among persons acquainted with farming pursuits and the mode of cultivation and treatment stipulated for. A good defence on the merits was also sworn to (a).

In an action for breaches of covenants in a lease to manure, repair, &c., the venue will not be changed on the ground that it will be necessary to call witnesses for the defence who live in the county to which it is sought to remove the cause, and that a fair trial can only be had in that county until after issue joined, when the nature of the defence would appear.

Knowles showed cause. The application is premature; for not only has issue not been joined, *Wea-therby v. Goring* (b), but no plea has been pleaded. That is fatal where this motion is made on special grounds, *Cotterill v. Dixon* (c).

(a) Essential in a motion to change the venue on a specialty, *ante*, Vol. III. 501.

(b) 3 B. & Cr. 352. N. B. There was no affidavit of merits in that case. Formerly it seems to have been considered too late to move to change the venue in an action on a specialty if issue had been joined. *Stra.* 834; 8 Taunt. 169; 1 T. R. 781, &c., cited 2 Archbold's K. B. Practice, 193; but in *Wea-therby v. Goring*, the court held, that to change the venue in such actions the defendant must make it clear that he had a real defence and witnesses to call in support of it; points on which a court could not possibly be informed till issue joined.

(c) *Ante*, Vol. III. 705.

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Channell supported the rule. *Weatherby v. Goring* was so decided because the affidavits did not develop the questions likely to be ultimately raised; whereas in this case the substance of the covenants and the special breaches of them alleged in the declaration having been detailed, the court is already informed of the matters in dispute, and of the nature of the defence to be raised. If the defendant suffers judgment to go by default, damages must be assessed on the breaches laid.

Lord LYNTHURST C. B.—Before issue joined, the nature of the question and the number and description of the witnesses required cannot be ascertained so as to enable a court to judge whether the venue ought to be changed or not. For any thing that appears the plea may be at variance with the defence pointed at in the affidavits. It may be a release to the whole. The defendant will not be injured, for he may renew this application at chambers after issue joined.

Rule discharged.

BRAITHWAITE, Executor of ULLOCK, *against*
Lord MONTFORD.

Assumpsit for
goods sold and
delivered.

Plea: statute
of limitations.

A writ of
summons

tested within six years from the accruing of the cause of action was put in by plaintiff. It had been twice resealed, and was not served until after the six years had expired. No evidence was given by the defendant when either resealing took place: Held, that the resealing gave effect to the original writ without amounting to a re-issuing of it, and without making it necessary for the plaintiff to prove the date of the resealing, or more than the teste of the writ.

ASSUMPSIT for hams sold and delivered. Pleas: non assumpsit and statute of limitations. At the trial before *Denman C. J.* at the *Westmoreland* assizes, the plaintiff having proved the goods delivered on 19th

May 1827, put in a writ of summons tested 1st *May* 1833, indorsed as served on 1st *June*. Three seals appeared on it, and it had been twice altered, once in the name and description of the defendant, and again in his place of residence from *Surrey* to *Middlesex*. For the defendant, it was urged that the plaintiff must show that the last resealing had taken place within the six years, but the Chief Justice directed a verdict for the plaintiff, saying, that the principle of *omnia rite acta præsumentur* applied. *Dundas* obtained a rule in *Michaelmas* term to set aside the verdict, on the ground that as the writ could not be altered without resealing, and must have been served again after being resealed, *Israel v. Middleton* (a), that was a reissuing, and the plaintiff should therefore have proved it to have been so reissued within six years. He also produced an affidavit that the defendant had been applied to, and that a *præcipe* dated 1st *May* was found on the *Surrey* file, but none on the *Middlesex* file.

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F. Pollock and *Wightman* showed cause. Any objection to the writ on the ground of irregularity in the service, should have been made by the defendant by motion promptly after it occurred, whereas even at the trial he was not prepared to show that the writ issued too late. If such matter could be proved at the trial it was incumbent on the defendant to do so. They were then stopped by the court, who called on

Dundas in support of the rule. The writ was in fact reissued on each resealing, though no dates are in this court subjoined on resealing. By 2 *Will.* 4. c. 39., the place and county of the defendant's residence must be named in the writ, which must be served in that county

(a) 1 Chitt. R. 320. E. 1819.

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or within 200 yards of the boundaries. It must also bear date the day it issued. [*Bayley* B. The act says nothing about sealing writs. *Israel v. Middleton* rather shows, that by resealing a writ it is not altogether in the nature of new process but may be served again. Stamp duties on writs were then in force. Resealing them gave revived effect to the original writ.] The second alteration of the defendant's residence from *Surrey* to *Middlesex* made the writ an entirely new one, for if the plaintiff intended to rely on the 1st *May* as the date of the first issue of the writ into *Surrey*, he should have continued that writ by alias into *Middlesex*; *Benson v. King* (a). So by *Reg. Gen. M. 3 Will. 4. No. 6.* [Vol. III. p. 3.] a plaintiff may proceed by alias and pluries writs, and that is the proper way where a defendant described as living in one county is afterwards found in another. He also cited *Weston v. Fournier* (b).

BAYLEY B.—I entertain no doubt on this point. In order to get rid of the plea of the statute of limitations the plaintiff must show when the writ was sued out, for if it was sued out within six years, and was regularly continued, it affords an answer to the plea. Under the old practice the writ was sued out within the six years, and afterwards continued *de die in diem*, so as to prevent the operation of the statute. Here, we must take it for granted that the writ was sued out on the day of its teste, viz. 1st *May* 1833. The action must be taken to have been then commenced (c). What has since occurred to prevent the operation of the writ from that date? Its original sealing was for *Surrey*,

(a) Tidd, 9th ed. 162.

(b) 14 East, 591.

(c) See *Alston v. Undershill*, ante, Vol. III. 427; *Thompson v. Dicus*, id. 873; *Hillary v. Rowles*, 5 B. & Adol. 460.

but as the defendant was improperly described, it was resealed, and his residence being found to be wrong, it was again resealed and altered to *Middlesex*. Then effect was given to the writ issued on 1st *May*. The first resealing gave authority to serve it in *Surrey*, the second in *Middlesex*. No fresh *præcipe* was necessary, as it would only run for four months from 1st *May*.

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VAUGHAN B.—This was a writ of 1st *May* continued by two resealings.

GURNEY B. concurred.

Rule discharged.

BAKER *against* WILLS.

THE Master to whom an attorney's bill of 272*l.* had been referred to be taxed, struck off 42*l.* viz. within 3*l.* of a sixth, and refused to allow him the costs of taxation. A rule having been obtained to allow him those costs, on the ground that one-sixth had not been disallowed in taxation; on showing cause *Elwood v. Pearce* (a) was cited.

If less than a sixth is taxed off an attorney's bill, the court may allow or return him the costs of taxation; and where very nearly a sixth was so struck off, the court refused the costs.

BAYLEY B.—I am of opinion that the Master was fully justified in refusing the attorney his costs of taxation in this case. The motion was made at the peril of the attorney. It appears from *Barker v. Bishop of London* (b), that by statute 2 *Geo. 2. c. 23. s. 23.*, if a sixth has been deducted from an attorney's bill he must at all events pay the costs of taxation; if less than a sixth, the court has a discretion to charge the attorney or client with such costs, according to the

(a) 8 Bing. 83.

(b) *Barnes*, 147; cited *arguendo*, 8 Bing. 83.

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reasonableness of the bill or the contrary. In *Elwood v. Pearce, Tindal* C. J. acknowledges that rule, and adds, that if in a case where the court may exercise its discretion, the amount taken off the bill approaches so nearly to a sixth, it ought not to be called on by an officer of the court to allow the costs of taxation. That authority applies to justify the course adopted by the Master in this case. Rule discharged with costs.

Steer supported, *Archbold* showed cause against the rule.

BEST *against* GOMPERTZ.

When a defendant, against whom judgment had been signed on a cognovit, in which he agreed not to bring a writ of error, or delay execution, brought a writ of error notwithstanding: Held, that the allowance of that writ of error was no supersedeas, and that he might be charged in execution notwithstanding. *Semble* otherwise if there is a release of errors.

ONE of the terms of a cognovit was, that defendant should not bring a writ of error or delay execution on the judgment; however, after it was signed, he brought a writ of error, which was allowed. Against a motion to charge him in execution, it was shown for cause that the allowance of a writ of error was sufficient to prevent the plaintiff from charging the defendant in execution without notice of the allowance. *Stonehouse v. Ramsden* (a). For the plaintiff, it was said that it was not sought to quash the writ of error, but to prevent its operating as a supersedeas against the defendant's undertaking not to bring it. The case was adjourned, to inquire into a case of *Davis v. Gompertz*, said to be similar, and in which *Parke* J., sitting in the Bail Court, remanded the prisoner to his former custody. On the court being subsequently informed that in that case there was a release of errors, *Bayley* B. said, "Primâ facie a plaintiff has a right to charge the defendant in execution, if he is not supersedeable. Now the allowance of a writ of error does not operate as a supersedeas, where it appears to have been brought for

(a) 1 B. & Ald. 676.

delay, or against good faith. A release of errors is a different species of security operating at a different time. Here the plaintiff's only security is a special agreement by the defendant not to sue out a writ of error, or do any thing to delay execution; that affords an answer to the writ of error, without which the defendant must have been remanded to his former custody. The defendant must be charged in execution as prayed.

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REDIT *against* LUCOCK.

ASSUMPSIT on a promise to marry. The plaintiff withdrew his record at the last spring assizes for *Suffolk*, for which notice of trial had been given. On the 9th day of *Michaelmas* term a rule nisi was obtained by *B. Andrews* for taxing the costs of the day for not proceeding to trial, to be paid by the plaintiff when taxed, or deducted out of the costs due to him. Cause was shown by *Kelly* that the motion should have been made in the next term after the default made, viz. in *Easter* or *Trinity* terms, and came too late on 11th *November*, as the plaintiff had obtained a verdict at the summer assizes, and signed final judgment on 7th *November*. In the King's Bench, signing final judgment and taxing costs are contemporaneous. In answer to a question by Lord *Lyndhurst*, *Andrews* said in support of the rule, that though final judgment had been signed, no costs had been in fact taxed.

A defendant may move for costs of the day for not proceeding to trial pursuant to notice, though the plaintiff has subsequently gone to trial, obtained a verdict and signed final judgment, if the cause is still in existence from the plaintiff's not having taxed his costs or obtained the fruits of execution.

Per Curiam (a)—There is no case to show that a defendant cannot apply for costs of the day, after final judgment, if the cause remains in existence. Now

(a) Lord *Lyndhurst* C.B., *Bayley*, *Bolland*, and *Gurney*, Bs.

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this cause is still in existence, the plaintiff not having been satisfied by the fruits of execution. These costs were clearly due at one time; they are interlocutory, parallel to and unconnected with those of final judgment, against which they ought to be set off, or paid to the defendant. The plaintiff is, in fact, benefitted by the delay to take the costs out of his pocket, for had the application taken place before, he would not have had costs to set off against them. Rule absolute.

FIGGINS *against* WARD and two Others.

If several defendants sued on their joint promissory note suffer judgment by default, it is sufficient to serve one with the rule to compute.

ALL three defendants having suffered judgment by default on their joint promissory note, the Court held that they had thereby acknowledged a joint cause of action, so as to be partners quoad hoc. Accordingly, service on one of them, an attorney, of the rule to compute, by leaving a copy with him, and two other copies for the two other defendants, was held sufficient. *Halcomb* in support of the rule.

Ex parte THOMAS ROACH GARRATT.

A person who had been admitted an attorney before 11 Geo. 4. & 1 Will. 4. c. 70. (23d July 1830,) and had taken out his certificate to practise in a court of great session in Wales, but had ceased to practise, and was not "then practising": Held that he was not entitled to be inrolled an attorney of a superior court under s. 16. of that act.

MANNING moved to inrol the name of Mr. Garratt on payment of 1s., in order to enable him to practise as an attorney of this court in actions against persons residing in *Wales*, under 11 Geo. 4. & 1 Will. 4. c. 70. s. 16. In order to show, as required by that section, that he was a person who, at the passing of that act on the 23d July 1830, was admitted an attorney, and was then practising in a court of great session in *Cheshire* or *Wales*, an affidavit was read

stating that he was admitted an attorney in a court of great sessions in 1823 and took out his certificate, but having married before the year expired, had since ceased to practise. [*Bolland B. cited Ex parte Read(a).*] There, a party who had been admitted an attorney in a court of great sessions in *Wales*, without having taken out a certificate before 23d July 1830, was held not entitled to be inrolled an attorney of the court of King's Bench under the above act, as not being then actually practising; whereas this applicant had taken out his certificate, and is within the equity and meaning of the statute.

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BAYLEY B.—The right here claimed depends on the express enactment of 11 *Geo. 4. & 1 Will. 4. c. 70. s. 16.* by which persons who shall have been admitted attorneys, and shall then, (*viz.* at the passing of that act, *viz.* 23 July 1830,) be practising in any of the courts of great sessions in *Wales*, shall be entitled, on payment of 1*s.*, to have their names inrolled in each of the superior courts at *Westminster*, and be allowed to practise in such courts in all actions against persons resident at the commencement of the suit within the county of *Chester* or principality of *Wales*. As the present applicant was not “then practising” in a court of great sessions he is not within the words of the act, and the court has no power to assist him.

Manning took nothing by his motion.

(a) 1 B. & Adol. 957. *Hil.* 1831.

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The ATTORNEY GENERAL *against* DUFFY.
(Revenue Case.)

A defendant in an excise information may defend in formâ pauperis on an affidavit that he is not worth 5*l.* over and above his apparel, and without certificate by counsel, that he has merits. But such a defendant is not entitled to a copy of the information, and can only have it read over to him by the officer, in order to his pleading then or at a future day.

THE defendant had been served with notice to appear to an information against him for certain offences against the excise laws, and obtained a rule to be admitted to defend in formâ pauperis, and to have a copy of the information gratis, on affidavit that he was not worth 5*l.* over and above his wearing apparel. *Tancred* for the Crown showed cause, that 3 & 4 *W.* 4. c. 53. s. 97. only extends to informations for offences against the smuggling acts, and does not apply to excise informations; also that a certificate of merits signed by counsel was as requisite to defending as to suing in formâ pauperis. There is no instance of granting a copy of an information as prayed. *Per Curiam*.—No copy of the information having been furnished to the defendant, and the notice to appear being couched in terms too general to show what the offence charged is, how could the defendant swear or his counsel certify that he had a good defence on the merits? In the common case of a plaintiff suing in formâ pauperis, the defendant is put to inevitable expense by the leave granted so to sue; on which account the certificate of counsel is required, besides the mere affidavit of poverty. As to allowing the copy of the information, the course of the King's Bench before 60 *G.* 3. & 1 *G.* 4. c. 4. s. 2. was, that the officer called up the defendant, and after reading over the whole charge to him, asked him whether he chose to plead then or to take time to do so at a future day. We will direct the clerk in court, on the part of the crown, to attend for that purpose to-morrow, and at another day, if requisite, to take his plea. Next day the officer having read the information to the defendant in court, he pleaded not guilty, which plea was recorded (*a*).

(*a*) No defendant can defend in formâ pauperis in a civil action. *Hullock's Costs*, 2d ed. 228; *Barnes*, 328.

FINCH *against* COCKER.

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A Rule was obtained for delivering up the bail-bond to be cancelled, on the ground that the defendant's real name was *Cocken*, and not *Cocker*, in which he had been arrested. The affidavit in support of the rule was entitled *Finch v. Cocker*. Cause was shown, that it ought to have been entitled *Finch v. Cocken*, (sued by the name of *Cocker*). And that in *Shaw v. Robinson (a)*, the court said, the defendant should have described the cause in the affidavit as he contended it should have been described in the writ. The court refused to suffer a renewal of the motion on an amended affidavit, saying, the motion sought to establish a strict and unimportant objection, while, on the other hand, the objection to the title of the affidavit was valid. Rule discharged without costs, the defendant being allowed four days time to put in bail. *Dowling* for, *Barstow* against the rule.

If it is made the subject of a motion for giving up the bail-bond to be cancelled, that the defendant was arrested by a wrong name, the affidavit should be entitled in the defendant's right name, "sued by the name of" (the wrong name).

(a) 8 D. & R. 423.

HERBERT and Another, Executors, *against*
PIGOT, Bart.

ASSUMPSIT by two of four executors of *Herbert*, deceased, to recover 90*l.* for goods sold and delivered, and work and labour by testator. The defendant paid into court 27*l.* 15*s.* 3*d.*, and pleaded the general issue to the residue. The plaintiff had served the defendant as gamekeeper till his own death, and received money as such on account of fish, &c., sold for his master. Six weeks before his death he delivered an account to

Two of four co-executors proved the will, and sued for goods sold and delivered, and work and labour done by the testator. The other two released to the defendant, who pleaded the release

pais darrein continuance. Held, that before the court would take the plea off the file, the plaintiff must make out a case of fraud.

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the defendant in their usual course, in which he stated 40*l.* 17*s.* to be due to him from the defendant. He afterwards delivered to the defendant two other accounts, the one stating that 55*l.* 3*s.* 7*d.*, and the other that 13*l.* 1*s.* 9*d.* was due from himself to the defendant. He appointed the plaintiffs, his relatives, and the defendant's butler and cook, his executors. The two latter did not prove the will or join in this action, but the non-joinder was not pleaded in abatement (a). At the time the defendant was called on to plead, he had mislaid the account of the 55*l.* 1*s.* 7*d.* stated by testator to be due to him, and paid money into court accordingly. Afterwards, and after the cause was sent down to trial, he pleaded *puis darrein continuance*, a release by the two executors who had not proved the will. A rule having been obtained by *Busby* for setting aside that plea and for giving up the release to be cancelled, the releasing executors swore, that in consequence of the plaintiff's refusal to refer the cause, they released the action without the defendant's solicitation or interference. The defendant's affidavit stated the same fact, and that the testator had no other claim on him than 40*l.* 17*s.*, and that having now found the account for 55*l.* 3*s.* 7*d.*, he had commenced an action against the executors for the balance due to him.

R. V. Richards showed cause for the defendant. Had the release been obtained by fraud, the plaintiffs might have replied that fact, and it might have been tried by the jury again; if in point of law the two executors who have not proved or joined in the action cannot release, that might have been tried on demurrer. But if the defendant had a right to plead this release,

(a) See cases collected, 1 Chitty on Pleading, 4th ed. 12, 13.

the court will not take the plea off the file unless fraud is shown. They did so in *Innell v. Newman* (a), because the release by the husband of the suit, brought by his wife as executrix in his and her names, was a gross violation of the very terms of the deed of separation, by which he secured to her as separate property all effects which she might acquire, or which by any representation she or he in her right might be entitled to, and covenanted to do no act to impede the operation of that deed, but to ratify all proceedings to be brought in his or their names for recovering such real and personal estates.

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Busby contra. The questions are, first, whether the release was obtained by the defendant in fraud of the plaintiff's right of action; and secondly, whether the defendant was, in point of law, in a condition to plead a release by strangers to the record? [*Bayley* B. They are not strangers in interest.] The objection on the record may be raised on error. It is enough that the release would work injustice, first, for want of consideration, and secondly, because the plaintiff's widow, who is admitted to be the only person beneficially interested, would be driven to a remedy against the co-executors. In *Mountstephen v. Brooke* (b), several plaintiffs having sued as trustees for the creditors of an insolvent, a release by one of them without consideration was pleaded puis darrein continuance; but the plea was set aside without costs, on the terms of indemnifying the plaintiff who had released, his name having been used without his consent. This release was a devastavit, and *Bayley* J. rests his judgment on that ground in *Innell v. Newman*. [*Bayley* B. The husband there did not assign as a reason on affidavit, that the debt

(a) 4 B. & Ald. 419.

(b) 1 Chit. R. 390.

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was not really due, and there was no colour for the release.]

BAYLEY B.—A release may be most unjust, in which case this court would interfere; but it may also be the means of furthering justice, and will then be suffered to remain on the file. There would be a good colour for it here; if the releasing parties had a well-grounded conviction, that no more was due to the testator than the sum paid into court; and if the plaintiffs, being certain of costs in case of success, and not being liable to pay them in a contrary event, sue a defendant who incurs the risk of paying all costs (*a*). This being an action by two out of four executors, the defendant pleads a release given spontaneously by the other two executors. They ought to have sued, but as no objection has been taken on the ground of non-joinder, the release must be taken to stand on the same footing as if they had been co-plaintiffs. *Jones v. Herbert* (*b*) decides, that a plaintiff who applies to set aside a release given by a co-plaintiff, and pleaded puis darrein continuance, must establish a very strong case of fraud. But no such case appears here. The accounts delivered by the testator before his death, state a balance in favour of defendant. The defendant having mislaid the material account in his favour, calculates on the remainder, that 27*l.* and a fraction is due to the plaintiff. That sum he pays into court, and offers to refer. This offer being refused, the co-executors thinking enough has been paid, give the release. The action may be oppressive, and the release fair. We ought to leave the plea on the record, in which shape it may be defeated, if in fact fraudulent.

(*a*) The action was brought before 3 & 4 W. 4. c. 42. s. 31, *ante*, p. 229, came into operation.

(*b*) 7 Taunt. 421.

VAUGHAN B.—In *Arton v. Booth* (b), the court of C. P. held, that if one of two plaintiffs release a defendant after action, but without the other's consent, the court will not set aside the release, unless fraud is clearly made out. It is here said, that the releasors are not parties to the record. They ought to have been so, and are interested in its subject-matter, and in seeing that the assets are not squandered. As no ground exists for imputing fraud, we ought not to interfere.

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BOLLAND B.—The question of fraud might have been raised in another form before a jury, as it appears that so far from any fraud on the part of the defendant, the release was given spontaneously, and from a conviction that defendant had paid more than was due. The rule must be discharged.

GURNEY B. concurred.

Rule discharged without costs (b).

(a) 4 B. M. 192.

(b) See also *Dyer*, 236; *Bayley v. Loyd*, 7 Mod. 250. *Ainer v. George*, 1 Campb. 392.

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GILLETT against HILL and Another.

An order signed by *O.* for the delivery by the defendants, wharfingers, of twenty sacks of flour to the plaintiff, (the party named in the order) was lodged with and accepted by them in the usual course of business; they at the same time declaring they had but five sacks to spare, which the party might have, and he received accordingly. On application for the rest, they declined to deliver it. On trover brought against them by the party named in the order, it did not appear that he knew that *O.* had any other flour in the defendants' possession, and the defendants did not produce any delivery orders, by which any such flour had been previously appropriated by *O.* The jury found that the defendants had accepted the order generally, and gave a verdict for the plaintiff for the value of the fifteen sacks. The court refused to disturb the verdict, and held that trover was maintainable, as the defendants had not limited their acceptance of the order to any minor quantity of *O.*'s flour then in their hands, or alleged that they must select the sacks to be delivered to the plaintiff.

TROVER against wharfingers to recover the value of fifteen sacks of flour. At the trial before Lord Lyndhurst C. B., at *Guildhall*, the following facts appeared: *Orbell*, a country miller, having drawn a bill on the plaintiff, a flour dealer, which was duly accepted, gave him an order on the defendants, his wharfingers, for twenty sacks of flour. Plaintiff's carman presented *Orbell's* delivery order for twenty sacks, at the defendant's counting-house. Their foreman answered that they had no more than five sacks to spare, and that he might have them. The carman took the five sacks, having lodged the order with the foreman, who filed it in the usual way; on applying the next day for the rest of the flour, the defendant's foreman said, you shall have it as soon as we get some; and to another application, made very soon after, answered, that the defendants had no flour of *Orbell's*. The defendants' witnesses, on cross-examination, would not swear that there were not fifty sacks of other flour of *Orbell's* on the wharf at the time the order was lodged, but said that if there was, it was appropriated by other orders. No such orders, were, however, produced by the defendants. It was also sworn, that the plaintiff's carman had lodged an order for five sacks, "*ex. 20,*" but it was not produced. For the defendants it was contended, that as the fifteen specific sacks of flour had not been

selected or appropriated by the wharfingers, no property in them passed to the vendee to enable him to maintain trover. For the plaintiff it was answered, that the defendants' acceptance of the delivery order for twenty sacks, was a virtual appropriation of that quantity to his use, and that the subsequent demand and refusal were therefore evidence of a conversion. The learned Chief Baron left it to the jury to say, Whether there was an acceptance by the defendant of the order for twenty sacks? The jury found there was, and gave a verdict for the plaintiff for the value of the fifteen sacks.

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A rule having been obtained for a new trial,

John Williams showed cause. The rest of *Orbell's* flour on the defendant's wharf was said to be appropriated by other orders, admitted to be in the defendant's possession, but not produced. [Lord *Lyndhurst* C.B. The case went to the jury on the credit due to the statement, that the appropriation had taken place by those orders which were not produced. That is the whole case, and the finding of the jury on it disposes of the law.] The Court then called on

Bompas Serjt. and *Haggins* to support the rule. The remaining fifteen sacks were to be selected, not by the plaintiff, but by the defendants from *Orbell's* other flour, as only five were delivered to the plaintiff. Then trover will not lie for fifteen specific sacks, while unappropriated to the plaintiff, the property not having passed out of *Orbell*. *Hanson v. Meyer* (a), *Rugg v. Minett* (b), *Austin v. Craven* (c). In *Bush v. Davis* (d) Lord *Ellenborough* and *Le Blanc* J. say, if something was to be done to ascertain the individuality of the

(a) 8 East, 625. 614. Starch case. (b) 11 East, 210. Turpentine case:

(c) 4 Taunt. 644.

(d) 2 M. & S. 397.

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thing to be delivered, the order to deliver entered in the wharfinger's books did not operate as a complete delivery. [*Vaughan B.* That case turns on the necessity to weigh the mats, in order to ascertain the quantity to be delivered.] Weighing was only one circumstance. [*Bayley B.* Where the article is to be weighed, the property does not pass to vendor till the weighing takes place, and then only in the part weighed.]

Lord LYNDBURST C. B.—It appears to me that the question of law sought to be raised in this case, has been decided by the facts found by the verdict. The order presented to the defendants on the plaintiff's behalf was this: "*Mrs. E. Hill & Son*, please to deliver to *Mr. Gillett* twenty sacks of household," and was signed by *Orbell*. That order was lodged with and filed by the defendants in the manner that orders accepted generally were filed by them in the usual course of business. The jury did not believe that it was not accepted generally. There was, however, evidence that on the same day another order was lodged for five sacks *ex. 20*: but it was not produced by the defendants, on whose files it would have been with the other order for the twenty sacks; nor did they shew it to have been lost; on the other hand, the acceptance by the defendants of the order to deliver *Orbell's* twenty sacks, afforded evidence that they had that quantity of his on their premises at the time, without any distinct proof on their part that they had more of his flour than those twenty sacks; or that if they had, they were appropriated to other orders. Then if the jury believed that *Orbell's* flour was not appropriated by any other orders of his, the point of law does not arise: but, suppose that the defendants had fifty sacks of *Orbell's* flour, and accepted an order to appropriate

twenty of them to the plaintiff, could not he bring trover for the twenty? (a)

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BAYLEY B.—The order to the defendants being general to deliver twenty sacks of household flour to the plaintiff, they must have known whether they had more or less than that quantity; and if they had less, might have accepted the order for the actual quantity, by indorsing it accordingly. That course would have prevented the contradictory statements of the witnesses; but there was no evidence of their acceptance to a limited extent only and not generally. The verdict for the plaintiff appears to me to be consistent with the evidence. On the other point, as to the form of action, I am of opinion that the action of trover was maintainable. The cases alluded to for the defendants may be divided into two classes; one in which, though a bargain and sale of the specific goods has taken place, yet as something remains to be done to them by the seller, the property remains in him till that is done, and does not pass to the vendee, so as to enable him to maintain trover. The other class is where the bargain is for a certain quantity of goods *ex* a larger quantity (b), and the vendor has a power to select what part he chooses to deliver, his ability to deliver that quantity not being at an end, *e. g.* by fire, &c. For example, if the seller is to deliver a quantity of oil, the bulk of which is to remain in his possession, there, before a division takes place by the vendor, no individuality is ascertained in the part sold, so as to sustain an action of trover or assumpsit for goods bargained and sold by the vendee (c). But those cases do not bear on the

(a) See *Jackson v. Anderson*, 4 Taunt. 24.

(b) *Busk v. Davis*, 2 M. & S. 397; *Shepley v. Davis*, 5 Taunt. 617.

(c) See *Wallace v. Breeds*, 13 East, 523; *Whitthouse v. Frost*, 12 East, 614; *White v. Wills*, 5 Taunt. 176; 1 Marsh. R. 258. S. C.; *Winks v. Hemall*, 9 B. & Cr. 372.

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present question. The order of *Orbell* was to deliver twenty sacks to the plaintiff, nor did it appear that the plaintiff knew *Orbell* had more flour there than the twenty sacks. The acceptance of that order by the defendants in the usual manner, and without restriction or saying they should select what sacks they should deliver, admitted that they had those specific sacks of flour of *Orbell's*, which they were content to hold for or deliver to the plaintiff, according to *Orbell's* order. Their subsequent declaration that they had not the twenty sacks, or twenty sacks unappropriated, is at variance with their previous acceptance of the order. That acceptance having been general, the property in the twenty sacks passed from *Orbell* to the present plaintiff, and this action of trover is sustainable.

VAUGHAN B.—The defendants attorned to the delivery order, and acknowledged the plaintiff's right to call on them for twenty sacks when he pleased. There is no satisfactory evidence that they had more than twenty sacks of *Orbell's* flour. But if they had, and had required time to select which sacks they should deliver, or appropriate to the order presented on behalf of the plaintiff, it might have been questioned whether before that appropriation trover would lie. But here their refusal to deliver the residue of the flour after accepting the order generally, and delivering part, was sufficient evidence of a conversion by them.

GURNEY B. concurred.

Rule discharged.

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MILES, Assignee of FAUX, a Bankrupt, against
GORTON and Others.

TROVER for hops, sold by the defendants to *Faux*, before he became bankrupt. Plea: general issue. The cause came on to be tried before *Gurney B.* at the second sitting for *Middlesex*, in *Easter* term 1833, when a verdict was found for the plaintiff for 32l. 7s. 6d., subject to the opinion of this court on the following case.

On the 16th April 1831, *Faux*, who resided then at *Birmingham*, contracted with the defendants, who are hop merchants, resident in *London*, for the purchase of, and they sold to him twelve pockets of *Kent* hops, and ten pockets of *Sussex* hops; and on the 24th of the same month he received at *Birmingham*, from the defendants, an invoice of the said hops, of which the following is a copy.

"Mr. Richard Faux, London, April 23d, 1831.

Bought of Gorton, Johnson, & Co. hop merchants,
Aldermay Church Yard, Watling Street.

12 pockets hops, Spring Kent 1826, (here the weights of £. s. d.
each pocket were stated) making 18cwt. 2qrs. 11lbs.

at 82s. 76 5 0

10 pockets do. Norris, Ton Street 1830, (here the weights,

&c. were stated as before) making 16cwt. 0qrs. 1lb. 13s. 1 6

Cartage 1 0 0

£209 6 6

"At Rent."

Held, that though the sellers might not have a right, while the bill remained outstanding, to part with the hops remaining in their possession, the assignee of the original buyer could not maintain trover for them without actual payment of the price agreed on, as well as of the warehouse rent, he having only the right of property, without that of possession.

A quantity of hops was purchased from the defendants in April 1831, the invoice of which contained the words "on rent." The hops remained in the seller's warehouse, and a bill accepted by the buyer was afterwards given them at their request, which they indorsed on getting it discounted. During the running of that bill, part of the hops was delivered, in pursuance of the buyer's order, to his sub-purchaser, who paid the warehouse rent charged by the sellers. Afterwards, and before the bill became due, the original buyer became bankrupt, and it was dishonored at maturity.

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The said *Faux* at the same time received from the defendants a letter, the following of which is a copy.

“Sir,—Above we hand you an invoice of your obliging order to Mr. *Hurst*. The quality of each lot is a sample, and we are sure will please you. We should think the sudden dissolution of parliament will create a decided improvement in the hop market. Your further commands will oblige, &c.”

(Signed by the defendants.)

It appeared in evidence on the trial, and was so found by the jury, that a certain bill of exchange for 209*l.* bearing date in *May* 1831, drawn by the defendants, payable to their own order, on the said *Faux*, and accepted by him at three months after date, was given at the solicitation of the defendants, in payment of the hops contained in the said invoice of 24th *April*. This bill was indorsed by the defendants, and discounted by them at the bank of *Lubbock & Co.* on 15th *June* 1831; but it was not paid when due, the said *Faux* having in the meantime been declared a bankrupt. All the hops except the samples delivered remained in the warehouse of the said defendants, until as hereinafter mentioned. On 25th *May*, the said *Faux* sold to one *W. Whitehouse* the ten pockets of *Susser* hops which formed one of the lots, and part of the hops contained in the said invoice. A few days after this sale the said *Faux* wrote to the defendants requesting them to transfer the ten pockets to Mr. *Whitehouse*, and send him samples of each pocket; to which the said *Faux* received from the defendants a letter in answer, the following of which is a copy:—

“Dear Sir,—Herewith you will receive samples of hops which we have transferred agreeably to your order, &c. &c.

London, June 4th, 1831.” (Signed by the defendants.)

On 4th *June* 1831, the hops so purchased by the said *W. Whitehouse* were transferred by the defendants, by the said order of the said *R. Faur*, to the said *W. Whitehouse*. On the 2d *July* following they were forwarded to him at *Birmingham* by the defendants, and he paid them on demand 4s. 2d. for warehouse room for the same for one month. The said *R. Faur* having complained to the defendants of the quality of these hops sold to *W. Whitehouse* on 29th *June* 1831, received from the defendants a letter with reference thereto, from which the following is an extract:—

“When the hop market is heavy every purchaser is a complainant, and so it appears the buyer of your *Norris* is; the lot is a very even one, as much so as you will find in general. We sent you samples of each pocket, and we are sure you would have complained, if the average was not correct. We are persuaded your buyer has no cause to object to fulfil his contract, if you sold the lot by your samples. We advise you not to listen for one moment to such an objection, which is only made because the market is dull.

London, June 28th 1831. (Signed by defendants.)

On 6th *July*, the said *R. Faur* became bankrupt. The twelve pockets of hops which formed the other lot, and for the recovery of which the present action is brought, were in the warehouse of the defendants at the time of the bankruptcy of the said *R. Faur*, and have so continued ever since. The plaintiff is the assignee of the estate and effects of the said *R. Faur*. A demand by the plaintiff on defendants of the hops, and an offer by him to them to pay them the warehouse rent for same, was proved, as also a refusal by the defendants to deliver them up, on the ground of their being their property. The question for the decision of the court is, whether,

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under the circumstances stated, the plaintiff, as such assignee, is entitled to recover the value of the twelve pockets of hops. If the court should be of this opinion, the verdict to stand, otherwise a nonsuit to be entered.

Follett for the plaintiff. The assignee is entitled to recover the value of the twelve pockets, because the defendants, the sellers, by charging the bankrupt in the original invoice with warehouse rent, did in fact execute a delivery of them to him as vendee, taking his acceptance in payment. That part of the defendant's warehouse which was occupied by these hops was that of the vendee, so that their transitus was at an end, and the defendants could not have stopped them; *Hurry v. Mangles* (a), *Harman v. Anderson* (b). Whether the warehouse rent thus stipulated to be charged was paid or not makes no difference; part however was in fact paid by *Whitehouse*.

The contract for both lots of hops was entire; and part has been transferred and delivered by the defendants to the vendee's order during the time the bill was running. [*Bayley* B. The question is, whether the defendants as sellers had a lien for the price of the whole of the hops remaining in their warehouse "at rent"? and if they had, whether it was broken by the delivery of part? (c). In *Hurry v. Mangles*, the warehouseman had actually received the warehouse rent (d). In *Bloxam v. Morley* (e) there was an actual part-payment for the goods. A stipulation for paying warehouse rent may make this difference, that it might create an additional lien for the rent besides the price. The circumstance

(a) 1 Camp. 452.

(b) 2 id. 243; but see *Bloxam v. Sanders*, 4 B. & Cr. 930, as cited 9 B. & Cr. 376.

(c) See *Bunney v. Poynts*, 4 B. & Adol. 568.

(d) So in *Winks v. Hassall*, 9 B. & Cr. 373. (e) 4 B. & Cr. 951.

of the bill outstanding in the hands of a third person might suspend the seller's lien during the time it was running, and might prevent the defendants from selling the hops to another person; but will the assignee of the buyer, whose right accrues in the interval, be entitled to sue for them?] Part-delivery may not destroy a lien on the other part for the price, but the delivery of part may be such as would amount to a constructive delivery of the whole in point of law, so as to put an end to the seller's right to stop the rest in transitu, had it before existed; *Shubey v. Heyward and Others* (a). This transaction however differs much from part-delivery, for the contract is, to buy 22 pockets to remain in the vendor's warehouse at rent for the whole. The buyer exercises control over them by selling a part, which are delivered to his sub-vendee, who pays the rent for that part. Had the whole been sold, they must have been delivered, as all, though of different qualities, were sold by one entire contract at a rent for the whole. [*Bayley B. In Harman v. Anderson*, the goods when sold were in the warehouses of third persons, wharfingers, who debited the sellers with rent accordingly. On the buyer's depositing the delivery order with the wharfingers, they immediately transferred the goods to his name, and debited him with warehouse rent. What had been the seller's warehouse became that of the buyer. Here, the seller has control over the warehouse, and though the vendee may have a right to receive the goods on paying the rent, I think such payment in respect of part, while the rest remained in the seller's hands, makes no difference as to the property in the latter. Though the lien of the seller might be suspended during the time the bill was running, so that the buyer might then have demanded the hops, it

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(a) 2 H. Bla. 504.

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would revive as against him if no demand was made until after the bill was dishonored, but not against his assignee.] In *Bloxam v. Sanders* (a) it was held, that though a vendee of goods acquires a right of property by the contract of sale, he does not acquire a right to possession of the goods until he pays or tenders the price of them, and could not support trover until the right of property and possession concur. But the circumstances of that case differ widely from the present. There all the acts of sale were by the original vendor by assent of the buyer *Sarby*, and no warehouse rent was stipulated for before the settlement of accounts; whereas in this case, the sale of part which took place was by the vendee to a third person, without intervention of the original vendors, who acceded to it and received the warehouse rent which had been stipulated for in the first instance. Again, as the bankrupt's acceptance was here taken for all the hops, was discounted, and is outstanding in the hands of a third party, who might have sued the acceptor before he became bankrupt, that was as against the sellers, the defendants, substantially a payment to them so as to strip them of any right to retain the hops; *Bunney v. Poyntz* (b). That outstanding acceptance would be a defence to an action for the price by the vendor; *Kearslake v. Morgan* (c). In *Horncastle v. Farran* (d), the owners of a ship having by charter-party a lien on the goods for their freight till the delivery of good and approved bills, took a bill offered them as payment, but disapproving of it would not relinquish their stop on the goods, yet afterwards negotiated the bill. That negotiation was held to amount to an approval of the bill, and to a relin-

(a) 4 B. & Cr. 941.

(b) 4 B. & Adol. 568.

(c) 5 T. R. 513. *Hil. 1754. Bayley B.* "That was the first case I ever argued."

(d) 3 B. & Ald. 497.

quishment of lien on the goods. Mr. Justice *Bayley* there said, "If *Campbell* (the freighter) had consented expressly to this negotiation, and yet had agreed that the plaintiffs should retain their lien on the goods, he would of course have been bound by that agreement; but that was not the case, and if the plaintiffs negotiated the bill without such express consent on his part, it seems to me that they gave up their lien on the goods. If we were to hold otherwise, the consequence would be this: that *Campbell* would be prevented from obtaining his goods in order to enable him to take up the bill, and yet he might be arrested on it and compelled to pay it. That would be a great inconvenience and hardship, which ought not to be imposed on him without his express consent." Again, in *New v. Swain* (a) the same learned judge said, "Where the owner of goods sells on credit, the buyer has a right to immediate possession; but if he suffers the goods to remain until the period of payment has elapsed, and no payment in fact is made, then the seller has a right to retain them." In no other case where the goods sold have remained in possession of the seller, did the vendee exercise control and ownership over them, by reselling and delivering them with vendor's consent out of the warehouse of the latter. Then the personal credit of the vendee was agreed to be taken in lieu of the lien, and the assignee of the buyer, on tendering the warehouse rent, was entitled to take the remainder of the hops from the possession of the seller. [*Vaughan B. Winks and another, assignees, v. Hassall* (b) is nearly similar in circumstances. *Bayley B.* That was a question whether the assignees of the buyer of two pipes of wine then in a bonded warehouse, could recover one of the pipes which had not been delivered without first paying

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(a) 1 Danson & Lloyd's Mercantile Cases, 193.

(b) 9 B. & Cr. 372.

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the duty on both, as the bankrupt had stipulated to do; and the court held that they could not. *Parke J.* was of opinion that the vendors had not waived their lien by giving a delivery order for the whole, it not having been acted on as to one pipe before the buyer's insolvency.]

Lloyd contra for the defendants was stopped. It was stated on the margin of the special case that the defendants would contend that there had been no delivery, actual or constructive, of the twelve pockets of hops which remained in their possession; and that on the insolvency of the buyer they had a right to retain them for the price.

BAYLEY B. (a)—I am of opinion that the plaintiff is not entitled to recover. This action is brought by the assignee of a bankrupt to recover the value of certain goods bought by that bankrupt; and the question is, whether the assignee, who stands in the place of the original vendee, would be entitled to possession of them without paying the price agreed by the latter to be given to the vendors. The general rule is, that if goods are sold, without stipulating at the time for particular terms as to payment of the price or time of delivery, though every thing the seller has to do with them is complete, and the property vests in the buyer so as to subject him to the risk of any accident which may happen to the goods (b), and the seller is liable to deliver them whenever they are demanded on payment of the price, still there results to the vendor, in respect of his original ownership, a right to keep possession of the goods till he pays the price agreed on for them. Therefore, in the interval before the bill was given for the price,

(a) Lord Lyndhurst was sitting in equity, *Bolland B.* at *nisi prius*.

(b) See *Tarling v. Baxter*, 6 B. & Cr. 360.

there is no doubt that the seller might have retained the hops till satisfied for the price. After the bill was given for the whole price, the condition of the parties was varied to a certain extent only. It gave the buyer, before his insolvency, control over the whole of the hops, and during the period of its running he might have insisted on the whole being delivered to him or his order. Thus, when he gave *Whitehouse* the delivery order for the *Sussex* hops he had a right to do so. That is consistent with *Hurry v. Mangles*, for the security there outstanding had been taken by the vendors, its original holders, as a valid security. Those ten pockets were actually delivered according to the right to direct that delivery which the buyer had before his insolvency. However, they were not delivered under such circumstances as would make an incomplete delivery of them a delivery of the remainder (a); but the delivery was pro tanto only, leaving to the vendors the same right to insist on payment for the residue as they would have had if no part had been delivered. The buyer afterwards became bankrupt, and his acceptance was dishonored while the twelve pockets remained in the seller's hands. I am of opinion, that no payment having been made by the bankrupt, and nothing equivalent to it having since taken place, the assignee cannot demand the remaining hops without actual payment for them. It has been argued, that as the bill drawn by the defendants on and accepted by the bankrupt is still outstanding, the sellers could not retain these hops (b). It is true that owing to that circumstance they may not have that complete control over them which it would be necessary to have in order to confer a complete title on another; but still their right to retain possession till the payment stipulated for will not be affected. Stress has been laid on the

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(a) See pp. 301, 302.

(b) See *Bunney v. Poyntz*, 4 B. & Adol. 568.

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fact, that by the original contract, while the hops remained on the vendor's premises warehouse rent was to be charged for them. Had it been all actually paid, it would have made no difference in my judgment as to right of property in the buyer, and that of possession in the sellers (a). In *Hurry v. Mangles* (b), not only was the warehouse rent paid to the defendants, but the claimants of the oil had paid the insolvent its price. But if the sellers had originally a right to hold the hops till payment of their price and of the warehouse rent also, the payment of that rent only will not entitle those who represent the buyer to have the possession of the hops without payment of the price. Here, the contract is only a stipulation that warehouse rent is *to be paid*. That does not make the seller's warehouse that of the buyer, but is only an intimation that in addition to the price of the article another price is also to be paid for the room it may continue to occupy in the seller's warehouse. Thus in the interim the goods were to remain in the custody of the original owner, whose right to keep them till the contract was fulfilled by payment of the price, was entire while all the goods remained, and became divisible when part was taken away. Then the plaintiff being identified in interest with the bankrupt whom he represents, cannot recover the value of the hops without previous payment for them.

VAUGHAN B.—In order to maintain this action the right of possession must concur with that of property in the bankrupt. The right of property appears to be in him, and he had a right to demand possession during the running of the bill; but when the period arrived at which it was dishonored, the sellers might avail themselves of the possession of part to insist on

(a) And see *Bloxam v. Sanders*, 4 B. & Cr. 947. Per Parke J. 9 B. & Cr. 376.

(b) 1 Camp. 452.

retaining them in default of payment. In *Winks v. Hassall (a)*, *Littledale J.* expressed a distinct opinion that the charge for warehouse rent does not constitute such a delivery to the party charged as would give him a right to maintain trover for the goods. The actual tender of the rent here made would be equivalent to payment, but that is not material; for as the twelve pockets of hops were never out of the vendors' possession, I am of opinion that they might hold them against the vendee till the purchase money is paid.

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GURNEY B.—There is nothing in the case to show that after the dishonor of the bill the vendors should not hold the residue of the hops as against the buyer or his assignee.

Judgment for the defendants.

(a) 9 B. & Cr. 375.

SOLLY and Others, Executors of CHANDLER, against
 HINDS and Another, Executors of UNDERDOWN.

ASSUMPSIT on a promissory note for 100*l.*, signed by *Underdown*, and payable on demand to *Chandler*, for value received. At the trial at the *Guildhall* sittings in this term, before *Bolland B.*, a subscribing witness to the note was called for the defendant, who swore that *Underdown* being dangerously ill at *Ramsgate*, in *August 1832*, made his will, and said he had left *Chandler* 100*l.*, for the trouble he would have as one of his executors after his death. Three days after, *Chandler* came to *Underdown*, who was still very ill, and said, very ill, for the trouble he would have in acting as his executor. The payee having died before the maker: Held, that the payee's executors could not recover on the note against those of the maker.

A subscribing witness to a promissory note expressed to be payable on demand for value received, proved that, just before it was signed, the maker was requested by the payee to give it him in lieu of a legacy left him by the maker, who was then

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that as he, *Chandler*, was to have 100*l.* for what he was to do in executing his, *Underdown's* will, it would save the legacy duty (a), if *Underdown* would sign a note for the amount then. The note in question being produced by *Chandler*, *Underdown* signed it. The subscribing witness said, "Mind, the note is given you for the trouble you'll have after *Underdown's* death." *Chandler* was silent. Six weeks after, *Underdown*, having recovered, sent the witness to *Chandler* for the note; but he would not give it up, unless the 100*l.* was paid him. He died in *December* of the same year, before *Underdown*. At the trial it was urged for the defence, that the consideration on which the note was given, had failed. The learned baron directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for the amount of the note and interest.

*Follett* moved accordingly. The evidence of the subscribing witness was admissible to show the agreement to be, that in consideration that *Chandler* would undertake to execute *Underdown's* will, *Underdown* would give him the note in question payable on demand; but could not be admitted to show, in contradiction to the terms of the note, that its payment was to be postponed till the payee had performed service as executor, or that it was to be returned by him if the maker recovered. Had *Chandler* sued *Underdown* on the note, the day after it was signed, must he have shown consideration in order to recover? [*Bayley B. Hactenus*, there was no consideration. The consideration was the doing the duty of an executor at a future period. It was prospective, and till *Chandler* was in a condition to fulfil it, he was not in a condition to sue.] The note is payable on demand; then had *Chandler*

(a) As to this see 5 B. & C. 501; 3 Pri. 368; 3 B. & Ald. 236.

sued on it in his lifetime, would it have been a defence at law, that the note was not to be paid till after *Underdown's* death, or till after services were performed by *Chandler* as his executor? In *Rawson v. Walker* (a) it was held, that the defendants, who had given a note payable on demand as a collateral security for goods sold by the payees, could not prove by parol that they were liable on a contingency only, because it would be inconsistent with the terms of the note. [*Bayley B.*—The evidence here showed, that there was no consideration (b). The time at which payment was to be made, is varied.] In *Woodbridge v. Spooner* (c), parol evidence was held inadmissible to show, that at the time of making a promissory note purporting to be payable on demand, it was agreed that it should not be payable till after the maker's death. Then who could be sued by *Chandler* on the note? He also cited *Grant v. Welchman* (d).

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*BAYLEY B.*—Had *Chandler* acted as executor of *Underdown*, he might have retained in respect of this note. The evidence proves that the consideration failed. The authorities cited apply where a specific period for payment is fixed. Here it is not on the consideration that the time of payment is postponed, but on facts collateral to it. If the consideration could have been afterwards supplied, the note might have been sued on, but not, in my opinion, during *Underdown's* life. In *Grant v. Welchman* time was given to pay part of a sum due at the time, and of which the party was then only able to pay a proportion. A note was given pay-

(a) 1 Stark. C. N. P. 361. *Ellenborough*, C. J.

(b) The presumption arising from the expression in a note, that it is given for *value received*, may be rebutted; per *Abbot C. J.* in *Holliday v. Atkinson*, 5 B. & Cr. 503.

(c) 3 B. & Ald. 233; 1 Chitt. R. 661. S.C. (d) 16 East, 207.

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able at a distant day, but there was nothing to prevent the payment taking place in the interim.

VAUGHAN and GURNEY Bs. concurred.

Rule refused.

NICHOLSON *against* LEMON.

An alias or pluries need not, since 2 W. 4. c. 39, be tested of the return day of the first writ, and their issuing is not confined by sec. 10. to any given period after the expiration of the first writ, except it issued to prevent the operation of the statute of limitations.

*MANSEL* had obtained a rule for setting aside an alias capias, which had been issued on the 18th *January*, the first writ having expired on the 15th.

*Channell* showed cause. Section 10 of the uniformity of process act 2 W. 4. c. 39. shows that the legislature fixed the time in which a writ shall be continued by an alias or pluries, only in the case of its being sought to prevent the operation of the statute of limitations. In other cases the act prescribes no time for issuing the alias or pluries, but directs by s. 12. that every writ issued under its authority shall bear date the day it issues.

*Mansel* contrà. The second writ was not properly continued. Before the act cited the alias must have been tested on the return day of the first writ. And as now the first writ does not endure above four months, some entry of its return should be made on record at that time.

BAYLEY B.—The question is, Whether continuances might not be entered at any time in this case, as was the practice, to avoid the statute of limitations? and I am of opinion, that they may, so as to connect the alias

or pluries with the first issued writ. It was clearly not intended by the act, that the alias should be tested of the day the first writ expired. The plaintiff has the whole of that day to execute the writ; it may be in a distant county, so as to need an interval to get it up to town in order to rule the sheriff to return it. Then if there may be an interval between one writ and another, is there any thing in section 10 imperative on the plaintiff to issue it within a limited interval? I am of opinion that the provisions of that section respecting continuation of writs, by which a writ must be continued within a fixed period, only apply to cases where the writ issued to avoid the statute of limitations, and that in other cases it is not necessary to issue an alias or pluries within any given period.

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VAUGHAN B.—The general words of section 10 enable the alias to issue as has been done in this case, and are not restrained by the proviso.

Rule discharged with costs.

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IGGULDEN *against* TERSON.

A Rule had been obtained, calling on the plaintiff to show cause why a rule of court should not be amended, by inserting the term that each party should pay his own costs. The defendant, who was sued as executor, had pleaded the general issue and plene administravit; both which issues were found against him. After motion to set aside this verdict, it was agreed that plaintiff should take judgment for 92l. assets quando acciderint, and that the verdict on the second

An executor who pleads non-assumpsit and plene administravit, is entitled to the general costs of the cause, if he succeeds on the latter plea.

*Semble.* No affidavit is necessary to substantiate be-

tween counsel what terms were offered or accepted by them on the hearing of a cause.

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issue should be set aside; the master, after two hearings, drew up the rule accordingly. *Thesiger* against the rule maintained, that the master's decision could not be impeached. *Halcomb* contra.—At the time of showing cause against the rule for a new trial, the counsel for the plaintiff offered that each party should pay his own costs. [*Bayley* B. There is no affidavit.] It is unnecessary; the matter in question having passed between counsel, on the hearing of a motion. On the judgment quando acciderint, the defendant was not liable to pay costs.

**BAYLEY B.**—It is confessed that the verdict should have been for the defendant, on the plea of plene administravit; then had the result of the trial been the correct one, the defendant would have had the general costs of the cause. *Per Curiam*.—Rule absolute, unless plaintiff consents in a week.—No costs to either party.

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*JONES against ROBERTS, Executrix.*

Issues were joined in fact and in law, and notice of trial of the former given, but the plaintiff having gone to trial, paid the costs of the day on motion in the subsequent

**A**SSUMPSIT for an attorney's bill. Pleas: non assumpsit, plene administravit præter certain judgments, and plene administravit generally. Replication, that one of the judgments was satisfied, but kept on foot by fraud. Issues in fact as to rest. Rejoinder, that the judgment was not satisfied. Demurrer thereto. The plaintiff made up the issues in fact, and gave notice of trial for the summer assizes for term. In that term the demurrer was argued, and the defendant had leave to amend, on payment of costs. The master disallowed all the plaintiff's costs of the paper books and briefs which related to the issues in fact, and was held right. In an action on an attorney's bill, the bill had been delivered, but an order for better particulars by adding the dates was granted, on defendants paying for the same. The plaintiff charged for drawing as well as copying the amended particulars of the bill. The master allowed the copying only, and was held right.

*Denbighshire*, which he afterwards countermanded, but not in time, and the defendant obtained a rule for costs of the day. Upon the argument of the demurrer [*ante*, p. 48,] the defendant had leave to amend the rejoinder, by traversing the keeping on foot by fraud, upon payment of costs. Thereupon all the issues became issues of fact. The master, in taxing the costs on the amendment, refused to allow to the plaintiff his costs of making up the issues in fact, and of the briefs prepared for trial, and his other costs incident to the notice of trial.

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Lloyd moved for a review of the taxation, contending that the issues must be made up anew, and the briefs altered.

BAYLEY B.—The master has thought, that the proper costs to be allowed to the plaintiff were those to which he was put by preparing to argue the demurrer. The issues in fact ought not to have been introduced into the demurrer books (*a*). The master's disallowance of the costs of making up the issues in fact, stands either on that ground, or on this, that if the plaintiff had a right to make up those issues, the costs will be costs in the cause; for those issues will still be necessary, with a little alteration and addition occasioned by the amendment, the costs of which will also be costs in the cause. The plaintiff has been put in the same situation as if the pleadings had been right at first.

Another objection was then made to the taxation. The plaintiff's bill having been delivered, an order was made by a baron for better particulars, with dates of the items, the defendant paying for same. A particular stating the plaintiff's bill was made out accordingly, with a fair copy for plaintiff's agents to keep, and both were left

(a) Reg. Gen. M. 9 G. 4; 2 Y. & J. 530; and see Tidd, 9th ed. 739.

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with them. The master only allowed the charge for the copy, on the ground that as plaintiff, on entering his cause with the marshal for trial, would have to annex the particular to the record, in obedience to *Reg. Gen. Trin.* 1 W. 4. No. 6. [*ante*, Vol. I. p. 522.] the charge in respect of drawing the particular would be costs in the cause.

BAYLEY B.—The plaintiff's bill of costs had been made out and delivered before the order for better particulars, by adding the dates. The master therefore did right in disallowing the charge for drawing the particulars, and in only allowing for copying them.

Motion refused.

MONCK *against* BONHAM.

Where a plaintiff who had sued a defendant as acceptor of a bill got payment from another party, and abandoned the action: Held that the defendant, who disputed his liability as acceptor, was bound to take down the cause by proviso, and could not have judgment as in case of nonsuit, or a peremptory undertaking to try.

ASSUMPSIT. Indorsee against acceptor of a bill of exchange. The plaintiff having given notice of trial without proceeding to trial accordingly, a rule nisi was obtained for judgment as in case of a nonsuit. Cause was shown on an affidavit, that the bill had been paid, the action abandoned, and that the defendant knew of the payment in *November* last. In support of the rule it was answered, that as the defendant disputed his liability as acceptor, and had not paid the bill to the plaintiff, the latter was entitled to a peremptory undertaking in order to recover his costs.

BAYLEY B.—A sufficient reason is shown for not forcing the plaintiff to trial, particularly as the defendant may try the case by proviso, in order to obtain his costs.

Rule discharged.

Welsby for, *Ryland* against the rule.

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TURNER and Another *against* DENMAN.

ASSUMPSIT. The declaration stated the defendant to have been summoned to answer the plaintiffs in a plea of trespass on the case on promises. The first count was on a bill of exchange by the plaintiffs as indorsees, against the defendant as acceptor, alleging a promise by defendant to pay the amount according to the tenor and effect of the bill, and of his acceptance thereof. The declaration then proceeded: "and whereas also the defendant was indebted to plaintiffs in 60*l.* for money lent, 60*l.* for money paid, 60*l.* for money had and received, and 60*l.* on an account stated," and ended thus: "and whereas the defendant afterwards, on &c., at &c., in *consideration of the premises respectively*, then and there promised to pay the said four last-mentioned sums of money respectively to the plaintiffs on request; yet he has disregarded his promises, and *hath not paid the said monies*, or any part thereof, to the plaintiffs' damage," &c.

Where the first count of a declaration was against the defendant as acceptor of a bill of exchange, stating a promise to pay the bill without any breach, and was followed by a count for money lent, money paid, &c. with a promise to pay limited to the latter sums, the breach is good if it goes on to state that he has disregarded his promises, and hath not paid the said monies to the said plaintiffs.

Demurrer to the declaration, stating for causes, that although plaintiffs have in their declaration alleged that defendant promised to pay the four last-mentioned sums of money in said declaration to plaintiffs, and has disregarded his promises, and has not paid any of the said monies thereby, meaning the last antecedent monies; that is to say, the four last-mentioned sums of money therein mentioned, yet they have omitted to allege any breach of the said supposed promise of the defendant in the said first count of the said declaration mentioned: Also that the declaration does not allege any breach by the defendant of his promise in the said first count mentioned: Also that there is no such form of action as an action of "trespass on the case upon

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promises," but that the declaration should have stated "an action on promises."

J. Jervis supported the demurrer. There is no breach in the first count, and that at the end of the second is limited to the four sums there mentioned.

Per Curiam—BAYLEY, VAUGHAN and GURNEY, Bs.

Judgment for the plaintiff.

Dundas was to have argued for the plaintiff.

HARDING *against* HIBEL.

Where a declaration alleged the defendant to be indebted to the plaintiff in a certain sum for work and labour, without laying any promise to pay it, and then under a 'whereas also,' proceeded to state him to be indebted to plaintiff in several other sums for goods sold and delivered, &c. concluding that the defendant had promised to pay the said last-mentioned several monies respectively to the plaintiff on request:—Held bad on demurrer for want of promise in the first count, which was not referred to by the words "last-mentioned" in the second count.

ASSUMPSIT. The declaration of *Michaelmas* term stated in the first count, that the defendant was indebted to the plaintiff in 50*l.* for work and labour as an attorney, without adding that being so indebted the defendant promised to pay. The declaration then proceeded: And whereas also the defendant was indebted to the plaintiff in 50*l.* for goods sold and delivered, 50*l.* for work done and materials found, 50*l.* for money lent, 50*l.* for money paid, 50*l.* for money had and received, and 50*l.* on an account stated, but without any promise to pay in any of them. It then alleged as a breach: and whereas the defendant afterwards on the same day and year aforesaid, in consideration of the premises respectively, then and there promised to pay "the said last-mentioned several monies respectively" to the plaintiff on request, yet he hath disregarded his promises, and hath not paid any of the

last-mentioned several monies respectively to the plaintiff on request:—Held bad on demurrer for want of promise in the first count, which was not referred to by the words "last-mentioned" in the second count.

said monies, or any part thereof, to the plaintiff's damage of 50*l.* &c.

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Demurrer to the first count, alleging for causes that it doth not aver any promise by the defendant, or the time and place thereof. Joinder.

The Court called on

Curwood to support the declaration. The whole is but one count.

Lord LYNTHURST C. B.—There are two counts, and the first alleges no promise to pay the sums therein alleged to be due. The words "last-mentioned" can only apply to the monies mentioned in the second count.

Per Curiam—Leave to amend on payment of costs.

Mansel was to have supported the demurrer.

SIMPSON *against* PENTON.

ASSUMPSIT for money lent and paid, and on an account stated. Plea: non assumpsit. At the trial at the *Middlesex* sittings in this term, one *Ovenston*, an upholsterer, swore that the plaintiff introduced defendant. The plaintiff having introduced defendant, said in his presence to *A.* "Have you any objection to supply this gentleman with some furniture? If you will, I will be answerable for it." *A.* asked how long credit would be wanted? Plaintiff replied "I will see it paid at the end of six months;" adding, it would be about 40*l.* or 50*l.* *A.* sent goods to the defendant's house, and no payment having been made by the defendant within six months, applied to the plaintiff for the amount, without previously requesting defendant to pay. The plaintiff having paid the amount: Held, that a jury was well warranted in finding that the credit was given by *A.* not to defendant, or to him and the plaintiff jointly, but to the plaintiff, whose promise to pay was therefore original, and not collateral only, so as to require any writing within the statute of frauds 29 *Car.* 2. c. 3.; and therefore that the plaintiff might recover the amount against the defendant as for money paid at his request. *Semble*, the circumstances of each case must be considered in deciding whether a contract be original or collateral.

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the defendant to him and asked him in the presence of the defendant "Have you (*Ovenston*) any objection to supply this gentleman with some furniture? If you will I will be answerable for it." *Ovenston* asked the plaintiff how long credit he wanted; the plaintiff said, "I will see it paid at the end of six months;" adding, that he thought the amount would be about 40*l.* or 50*l.* *Ovenston* agreed to it, and the defendant gave him the order mentioning the articles. Both plaintiff and defendant told him they were to be sent to the defendant's house, which they described. They were sent accordingly, and amounted to 46*l.* 10*s.* The defendant had paid nothing at the end of six months. *Ovenston* then called on the plaintiff to pay, and having taken from him a bill at six months for the amount, received the money when due. The defendant never paid any thing, and was never called on by *Ovenston* to pay. *Ovenston* had known the plaintiff before but not the defendant, and took no guarantie from the plaintiff. The entry in *Ovenston's* ledger was "Mr. *Pentons* per Mr. *Simpson*." At the trial it was contended for a nonsuit, that the goods being ordered for the defendant by the plaintiff, the promise of the plaintiff could only be collateral, and should therefore have been in writing within the statute of frauds; so that as no request to the defendant to pay as the original debtor had been proved, the plaintiff had paid the money to *Ovenston* in his own wrong. *Bolland B.* gave leave to move to enter a nonsuit. The jury found that the goods were sold to and on the credit of the plaintiff, to be paid for by him in the first instance; and gave him a verdict for the amount.

Bompas Serjt. moved according to the leave reserved. Was there such a request of the defendant to pay as would make the plaintiff liable over? The plaintiff was not legally liable to pay for the goods, his oral

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undertaking to pay for them being void by 29 C. 2. c. 3. [Bayley B. That depends on the fact whether *Ovenston* made the plaintiff or defendant his original debtor; for if the credit was given originally to the plaintiff, then the plaintiff's contract is not an undertaking to pay the debt of another within the statute of frauds.] The plaintiff's words are equivalent to those in *Matson v. Wharum* (a); which were held void as a promise for want of being reduced into writing. "If you do not know him you know me, and I will see you paid." [Bayley B. This defendant, if sued by *Ovenston*, might have answered, "I never bought goods of you or engaged my credit." Then was the defendant ever trusted? Did the plaintiff undertake to "pay," or undertake to pay "if the defendant did not?" Those were questions for the jury.] *Dixon v. Broomfield* (b) rather shows that the court is to decide whether the undertaking is sufficient within the statute or not. [Bayley B. That is questionable. Vaughan B. At all events a jury must decide to whom credit is given on a sale of goods.] The purchase might be joint and the credit given to both; if so, the oral promise of the plaintiff was void, *Anderson v. Hayman* (c); and he paid *Ovenston* in his own wrong, not being liable to do so.

BAYLEY B.—The question is, whether the plaintiff or the defendant was to be paymaster? For if *Ovenston* gave the credit to the defendant, the undertaking of the plaintiff was collateral, and ought to have been in writing within the statute of frauds. But if the plaintiff originally undertook to pay for the goods supplied to the defendant, then the plaintiff was bound to pay *Ovenston* for them without a written contract, and had a right to

(a) 4 T. R. 80. (b) 3 Chitt. R. 205.

(c) 1 H. Bl. 220; also see *Croft v. Smallwood*, 1 Esp. 121.

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sue the defendant for the price as for money paid to his use and at his request. Whether the contract by the plaintiff was original as above, and bound him to pay at all events, or was collateral, viz. only binding him if the defendant did not pay, depends on the expressions used. Now "I will be answerable" and "I will see you paid" are equivocal. Besides, we ought to look to the circumstances to see what the contract between the parties was. I say so on the authority of *Oldham v. Allen*, Michaelmas term, 24 Geo. 3. (a), where the court of King's Bench said, a contract might be collateral or not, according to circumstances. The defendant had sent to a farrier to attend some horses, and said to him, "I will see you paid." The farrier debited such of the owners of the horses as he knew, and the defendant for the rest whose owners he did not know, and the court held that the defendant's promise was collateral as to the former and original as to the latter. That case turned on the same words, and the circumstances were held to make the promise either original or collateral. Here, though the goods were furnished for the defendant's benefit, not a word of his pledging his credit is shown. It appears to me that the jury were well warranted in finding the plaintiff to be the original debtor. I rely on the facts of the case and not the equivocal expressions of the plaintiff. I am satisfied that though the defendant might have paid *Ovenston*, he had only a legal claim against the plaintiff.

VAUGHAN B.—The evidence abundantly shows that this was not a guarantie, but that the goods were originally furnished on the plaintiff's credit. It is said, that the plaintiff has paid the money which he seeks to

(a) This case is not found in the 3d vol. of *Douglas's Reports*, containing *Michaelmas*, 24 G. 3.

recover without authority from the defendant; but as he stood by while the plaintiff pledged his own credit for goods to be sent to the defendant's house, his promise to repay the price paid on his account is implied.

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**BOLLAND B.**—*Penton* goes with *Simpson* to *Ovenston's* shop and hears *Simpson* pledge his credit to pay for goods selected for his, *Penton's*, benefit. Then the evidence warrants the original liability of *Simpson* to *Ovenston*, and *Penton's* liability to *Simpson* for the money paid by him on his account to *Ovenston*.

**GURNEY B.** concurred.

Rule refused.

**PERROTT against DEANE.**

**THE** defendant having been brought up under the compulsory section of the lords' act, viz. 32 Geo. 2. c. 28. s. 16. had sixty days allowed him to deliver in his schedule, pursuant to section 17., but afterwards petitioned the insolvent court under 7 Geo. 4. c. 57. and did not file his schedule under the lords' act.

*Erle* for the defendant had obtained a rule to enlarge the time for filing the schedule, and

The Court, after hearing *Follett* for the plaintiff, said, that as the defendant was to be brought before the insolvent court on the 15th *January*, they would enlarge his time for filing his schedule in this court till the 20th (a).

A debtor who had been brought up under the compulsory clauses s. 16 and 17. of the lords' act 32 Geo. 2. c. 28., had 60 days allowed to deliver his schedule, but having afterwards petitioned the insolvent court under 7 G. 4. c. 57., this court enlarged the time for delivering his schedule to five days after he was to be brought up before the insolvent court.

(a) See *Res v. Bell*, 7 D. & R. 234.

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## SOWERBY and Others against JOHN BUTCHER.

A bill was drawn on the consignees of a cargo of coals shipped to Rochester by the broker at Newcastle, who had effected the purchase there. That bill was returned to the payees, the coal owners, unaccepted, on account of the date being too short. The broker having directed the payees to prepare another bill at a longer date, they did so, and sent it to his counting-house in N. for his signature. The broker had in the meantime left Newcastle in pecuniary embarrassment, and his brother, the defendant, had come to the counting-house to investigate his affairs. The defendant, in the absence of his brother, and at the request and for the convenience of the plaintiffs, signed the bill they had prepared without qualification of his liability: Held that he was personally liable as drawer to pay the bill.

**A**SSUMPSIT on a bill of exchange for 96l. 9s. 1d., dated 8th March 1832; drawn by defendant upon, and accepted by Devey, payable to the order of the plaintiffs. Plea: general issue. At the trial before Denman C. J. at the last Northumberland assizes, it appeared that the bill had been drawn by the defendant, a London coal factor, in favour of the plaintiffs, who were coal owners. The plaintiffs' clerk was called for the defendant to prove that no consideration had passed to him for the bill, and that the plaintiffs knew that fact. About the end of February 1832, the plaintiffs being applied to by Robert Butcher, the defendant's brother, a coal factor at Newcastle, to consign a cargo of coals to Messrs. Devey of Rochester, shipped and consigned it accordingly. After the vessel had sailed, Robert Butcher drew a bill on Deveys for the amount in favour of the plaintiffs; that bill was returned to the plaintiffs unaccepted, on account of its having been drawn at too short a date. By direction of Robert Butcher, the plaintiffs' clerk prepared another bill (now sued on) at a different date, drawn on W. Devey alone, and took it to Robert Butcher's counting-house in Newcastle for his signature. He there saw the defendant, who said his brother Robert had left Newcastle. The witness asked him if Deveys would accept a bill signed by him. The answer, if any, did not appear. He then requested the defendant to sign the bill as drawer in his brother's absence, as it would be a convenience to the plaintiffs, and he did so without objection. After this the defendant attended to his brother's business at his counting-house in Newcastle, but witness knew nothing of the previous transaction before he signed the bill at the request of the witness; and that there

was no consideration for the bill between plaintiffs and defendant. The witness agreed to give up the first bill, and in fact destroyed it two or three days after. *Robert Butcher* deposed that the defendant had nothing to do with the cargo in question, and came to *Newcastle* to investigate his (the witness's) affairs, when he left *Newcastle* in pecuniary difficulties. The lord chief justice refused to nonsuit the plaintiffs, but gave leave to move to enter a nonsuit. Verdict for the plaintiffs for the amount of the bill. A rule having been obtained accordingly,

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*F. Pollock* and *Ingham* for the plaintiffs showed cause. The defendant, well knowing the cause of his brother's absence, transacted business at his counting-house, and signed this bill without excluding his own personal liability, by stating on the face of it that he signed as his agent, or by procuration for him. He knew of the return of the first bill. In *Lefevre v. Lloyd (a)*, a broker who had sold goods drew a bill on the buyer for the amount in favour of his principal, who was not in *London* when the goods arrived. The bill was so drawn without consideration, and to expedite the transaction of sale; yet the broker was held liable on it to his own principal, on the ground that all the same legal consequences resulted from his act of signing the bill, as they would from signature by any other party. In *Leadbitter v. Farrow (b)*, the plaintiff knowing the defendant to be the *Hexham* agent of the *Durham* bank, sent 50*l.* to his house to procure a bill on *London* for the amount. The agent drew a bill accordingly in favour of the plaintiff on the firm in *London*, which consisted of the same partners as the *Durham* bank, but without signing as agent only, and he was held per-

(a) 5 Taunt. 749; Bayley on Bills, 4th edit. 54. (b) 5 M. & S. 345.

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sonally liable; Lord *Ellenborough* saying, "unless he says plainly I am the mere scribe, he becomes liable."

*Cresswell* and *Alexander* in support of the rule. The evidence is, that the defendant came to *Newcastle*, not professing to transact his brother *Robert Butcher's* business as his agent, but to investigate his affairs. The coals had been shipped long before he arrived; nor was the first bill destroyed by the plaintiffs till some time after the second was given; so that there appears no benefit to the defendant, or loss of any right by the plaintiff at the time of the defendant's signing it. Then it was a question for the jury, whether it was not a mere accommodation bill drawn by the defendant in the absence of his brother, at the plaintiffs' request, for their convenience, and with their express knowledge that it was so drawn without consideration. *C. J. Eyre* lays it down in *Collins v. Martin* (a), that the truth of the transactions between the original parties to bills may be given in evidence to destroy the *prima facie* presumption of value received afforded by them. In *Lefevre v. Lloyd* the court seems to have rested their judgment against the defendant, on the ground that he being a broker in good credit, the vendors, in taking the bill he drew, relied on his responsibility, without caring about the solvency of the purchaser. In *Lead-bitter v. Farrow*, not only was the defendant an actual and well-known agent, but a consideration passed to him; and Lord *Ellenborough* C. J. says, "though the plaintiff knew the defendant to be agent to a country bank, he might not know that he meant to offer his own responsibility." Here, even assuming defendant to be an agent, no value passed to him, not even the old bill. In *Thomas v. Bishop* (b), it is said by the court,

(a) 1 Bos. & Pul. 651. See *Guichard v. Roberts*, Bla. R. 445.

(b) 2 Stra. 955.

that in the case of a bill addressed to the master, and underwritten by the servant, undoubtedly the servant would not be liable, but his acceptance would be considered as the act of his master. It did not appear that the first bill was destroyed in consequence of any communication with the defendant.

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BAYLEY B.—I am of opinion that there was in this case no question for the jury whether value had passed from the plaintiffs to the defendant for the bill, and that there was no evidence that it was drawn for the accommodation of the plaintiffs; but that the whole was simply for the consideration of the judge, who did right in directing a verdict for the plaintiffs. It may have been that the defendant unguardedly signed the bill without considering the consequences of so doing, and without consideration for binding himself as a principal. But we cannot say there was no consideration for so signing it. If drawn to accommodate any person, it was drawn, not for the accommodation of the plaintiff, but of *Robert Butcher*. The plaintiffs had supplied goods consigned to *Devey & Co.*, for which *Robert Butcher* was liable, and for which he drew a bill on the consignees, which made him responsible as drawer, if they did not pay. That bill was returned unaccepted; the plaintiffs then had a right to sue *Robert Butcher* for not procuring *Devey's* acceptance, or to have a new bill from him. They elected a new bill at a longer date, and prepared one for his signature. He left *Newcastle*; the plaintiffs might be wholly ignorant of the cause of his absence, or of any circumstances destructive of his credit. At that time the plaintiffs had a right to have a new bill drawn on *Deveys*, the consignees of their goods. On application at *Robert Butcher's* counting-house they saw the defendant; and on his stating his brother *Robert's* absence, requested him to sign the bill as drawer. It

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was then in his discretion to sign the bill or not, and if he signed it, he might state on the face of it that he did so as agent for *Robert Butcher*, or have signed "by procuration *Robert Butcher, John Butcher*." Had he done so, *Robert Butcher* would have been liable. It would have been the part of a prudent man to state that he only drew the bill as agent for his brother, and not as being personally responsible, and to have asked for a written acknowledgment that he should only be held liable as such agent and not personally. Here he signed it generally, and thereby incurred personal obligation. It is no answer to say that he had no consideration for binding himself personally, if he has professed to do so; for the plaintiffs were entitled to insist on having some bill to be binding on some one. The debt of a third person is a good consideration for which a man may bind himself by giving a bill of exchange. In *Popplewell v. Wilson (a)*, A. gave a note to pay so much to B. for a debt due from a third person to B., and it was held in the King's Bench, on error from the Common Pleas, that it was valid within stat. 3 Ann. c. 9. being an absolute promise, and every way as negotiable, as if it had been generally for value received. Detriment to the plaintiffs, or a right in the latter to have a bill from somebody, will either of them afford a sufficient answer to the objection of want of consideration for the bill. It is not sufficient for the defendant to show that independently of the bill there is no consideration; but he must prove affirmatively that there was none, and that the plaintiffs are wrong in demanding payment of such bill from any one. The consideration for a bill need not necessarily be such as would maintain an action on a special contract. Here there was sufficient evidence of consideration, and that the bill was not drawn for the accommodation of the plaintiffs.

(a) Stra. 264. Hil. 6 Geo. 1. See ante, Vol. I. *Ridout v. Bristow*.

They would not have cared whether the bill had been drawn in the name of one or the other brother; but being drawn in this form, they have a right to sue on it accordingly.

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VAUGHAN B.—I am of the same opinion. The case could not have been properly left to the jury as one on the circumstances of which they could be warranted in finding that the bill could not be enforced by these plaintiffs against this defendant. Whether the defendant was clothed with agency for the brother, does not distinctly appear; but he is found at his counting-house acting in a manner as if he were conducting his business. Upon being requested to sign the bill in question, he did not by signing as agent interpose his declaration on the face of the bill that he would not be personally liable, but signed the bill generally. Then, as he did not qualify his liability in terms, he became personally responsible. The above is the main ground of my opinion. As to the argument that there was no consideration, the second bill was to be a substitute for the first, which was to be given up and was destroyed (a).

GURNEY B. concurred.

Rule discharged.

(a) See *Ex parte Borelay*, 7 Ves. jun. 597; *Puckford v. Maxwell*, 6 T. R. 52; *Bishop v. Rowe*, 3 M. & S. 363.

#### SIMPSON against RALFE.

**A**SSUMPSIT for attendances on the defendant, and on another at his request, as a surgeon, and surgical aid, and also dispensed medicines to them, not being certificated as an apothecary under 55 G. 3. c. 194.: Held, that he might recover for his surgical advice.

When a surgeon attended patients in cases requiring surgical aid, and also dispensed medicines to them, not being certificated as an apothecary under 55 G. 3. c. 194.: Held, that he might recover for his surgical advice.

*Seemle*, that a surgeon may dispense medicines to his patient in a case which he attends requiring surgical aid.

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for work and labour, and materials furnished. The particulars demanded 15*l.* for attendances, and goods and materials furnished, sold, and delivered. *Plea:* general issue. At the trial before the secondary of *London*, under a writ of trial, it was proved that the plaintiff, as a surgeon, attended the defendant for a complaint in his eyes for several weeks in 1832, and was seen to apply leeches, &c. He afterwards attended the defendant's wife for a palpitation of the heart and cough. During his attendance he sent in medicines to both. A chemist proved that up to 1831 plaintiff used to write prescriptions for patients, which the witness made up, but that since that time he had not made up any. A surgeon who was called to prove the charges reasonable, was asked whether the cases described were surgical, medical, or mixed; and answered, that they were surgical, and that for his surgical attendance in them the plaintiff was entitled to 11*l.* The plaintiff had a verdict for that sum.

Comyn moved to set aside the verdict and enter a nonsuit. [*Bayley B.* You cannot move to enter a nonsuit without leave of the judge (a).] He then moved for a new trial. The plaintiff is not entitled to recover any part of his demand, as he is not shown to have been a practising apothecary before 1st August 1815, nor to have obtained a certificate pursuant to stat. 55 *Geo.* 3. c. 194. If a person acting as a surgeon can make up, compound, and dispense medicines, the objects of that act will be frustrated, and the examinations which it requires as to competent skill would be obviated. The plaintiff's demand in respect of each case is entire, and cannot be divided so as to entitle him to recover for the surgical part only. In the *Apothecaries Company v. Allen* (b), the plaintiff kept no

(a) See *ante*, p. 772.

(b) 4 B. & Adol. 625.

shop, but lived in lodgings, and was not able to make up a physician's prescriptions, but advised patients and made up and sold to them the medicines he himself ordered. That was held to be an "acting as an apothecary," within the apothecaries' act 55 *Geo. 3.* c. 194., and it made no difference that he prescribed as well as prepared the medicines.

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BAYLEY B.—That was an action for penalties for acting and practising as an apothecary only. The facts of this case are, that the plaintiff is not an apothecary, and that part of his demand is for attendance as a surgeon, and part for medicines furnished. Now there was evidence for the jury that the complaints were of a nature requiring surgical aid. Then if the plaintiff attended as a surgeon, the apothecaries' act does not take away his power to recover for his attendance as such, because he also dispensed medicines. There is no evidence that the medicines were dispensed by the plaintiff as an apothecary, nor does he claim as one. I do not see why he might not dispense medicine as incident to his business in the course of attending a patient as a surgeon (a). It was for the defendant to make out the plaintiff to have practised as an apothecary, in order to destroy any claim he might have as a surgeon. A man, licensed by the College of Surgeons, may practise as a surgeon without a certificate from Apothecaries Hall, *Apothecaries Company v. Ryan* (b). The witness swore the cases to be surgical, and that the plaintiff's attendance, as a surgeon, entitled him to the sum for which the verdict was given.

VAUGHAN B.—Even if the plaintiff had acted as an apothecary, by dispensing medicines, how would that

(a) And see per *Best C. J.* and *Park J.* in *Allison v. Haydon*, 4 Bing. 621.

(b) Tried at the *Kent assizes*, but not reported.

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deprive him of the right to recover for his attendance as a surgeon, though it might have been doubtful whether these cases were of the description called surgical? The jury have discarded all except the plaintiff's surgical services.

BOLLAND B. concurred.

GURNEY B.—I have frequently known cases where a charge for medicines dispensed by a surgeon has been relinquished, and a verdict given for the surgical attendance.

Rule refused (a).

(a) A person certificated by the college of surgeons cannot recover charges for attending a patient in a fever, unless also certificated under the apothecaries' act; *Allison v. Haydon*, 4 Bing. 619.

WINGROVE against HODGSON.

Where issue was joined in a town cause, early in the vacation after *Trinity* term, and no notice of trial was given: Held, that the practice was not affected by the Uniformity of Process Act, 2 Will. 4. c. 39. and that it was premature to move for judgment as in case of a nonsuit, in *Hilary* term, or before the third term.

ARCHBOLD moved, in a town cause, for judgment as in case of a nonsuit. Issue was joined in *July*, in the vacation after last *Trinity* term, and was delivered on 24th *October*, without indorsement of notice of trial. [*Bayley* B. There has been a default in one term only; for no notice of trial could have been given except for the sittings in *Michaelmas* term.] Before the uniformity of process act, 2 Will. 4. c. 39. issue thus joined would have been entitled as of *Trinity* term, instead of, as at present, the day on which it is joined. *Trinity* term would then have been reckoned one term. [*Bayley* B. dissented.] The case having been postponed in order

to consider the effect of the uniformity of process act, the opinion of the Court was next day delivered by

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BAYLEY B.—Before the act alluded to, the plaintiff would have had the whole of the next term after that in which issue was joined (*a*) in which to try his cause, and would be guilty of no default in so doing till the third term after that in which issue was joined (*b*). The officer certifies that in this Court two defaults to try must precede this motion, where no notice of trial has been given. That being the state of the practice before 2 *Will.* 4, c. 39. the uniformity of process act, we have conferred with my brothers *Parke* and *Patteson*, who agree with us in opinion that that act makes no difference in the time of moving for judgment as in case of a nonsuit, and that that motion cannot be made till the third term after that in which issue was joined, unless notice of trial has been given; in which case the common rule applies, *viz.* that the motion may be made in the next term after that in which issue was joined.

Per Curiam. — (*Bayley, Vaughan, Bolland, and Gurney, Bz.*)

Rule refused (*c*).

(*a*) *Hall v. Beckenham*, K. B. & T. R. 734, a country cause. In C/P. *Baker v. Newman*, 1 H. Bl. 123, a town cause.

(*b*) Though a plaintiff be too late in the second term to try, no default will be punished till actually committed; and a motion in the second term is premature, 2 H. Bl. 558.

(*c*) See same principle in a country cause; *Simons v. Folkingham*, *ante*, Vol. I. 501.

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JACKSON *against* STOFFERD.

The plaintiff and defendant had worked a coal-pit in partnership till it was exhausted, when plaintiff said he would join in no more coal-pits, and defendant said he should work another whether plaintiff joined him or not. The materials and utensils belonging to the mine were valued, and each party was to take an article by turns, according to that valuation, till the whole was divided. The valuation was made, and it was subsequently agreed that the defendant should take the whole at the valuation, and he took possession of them. The other partnership debts and credits remained un-

settled: Held, that this was a transaction so separate and distinct from the general accounts, that the plaintiff might sue for his moiety of the value of the materials and utensils before the final settlement of the partnership accounts.

A valuation made for the information of parties, and not binding on them, is not made liable to an appraisement stamp, by 55 Geo. 3. c. 184. Sched. Part I. tit. *Appraisement*, though an agreement is afterwards founded on its data.

ASSUMPSIT for goods sold and delivered, with counts for money had and received, and on an account stated. Plea: general issue. The facts proved at the last *Lancashire* assizes were, that a coal mine had been rented and carried on by the plaintiff and defendant jointly for some years before *December* 1831, when the coal being worked out, *W.*, at their mutual request, balanced the profit and loss of the concern, with the exception of some coal still unsold, some debts due to the firm, and some small bills of debts due from it not yet sent in. He was also to value the materials and utensils in use for the mine, and each party was to take an article alternately at that valuation till all were divided. The plaintiff said he would join in no more coal pits; defendant said he should work another pit, whether joined by plaintiff or not. *W.* made an inventory, amounting in all to 171*l.*, annexing a valuation of each article; and having met the parties, communicated to them the amount. At a subsequent meeting the parties agreed that the defendant should take the whole materials and utensils at half the amount of the valuation; he took exclusive possession of them in consequence, and this action was brought for the amount.

For the defendant it was objected, first, that the valuation which was offered in evidence could not be received without a stamp, according to 55 Geo. 3. c. 184. schedule, Part I. tit. *Appraisement*; and that as a writing existed, the amount could not be proved by

parol evidence. Secondly, that as the partnership accounts had not been finally settled, and no express promise appeared to pay the moiety of the value of the materials, the plaintiff could not recover. *Bolland v. B.* gave the defendant leave to enter a nonsuit on both points, but told the jury that if, on the facts proved, they thought the partnership at an end, and that the defendant took to the materials, &c. on an agreement to pay half the sum at which they were valued, they should find a verdict for the plaintiff. The verdict was for the plaintiff, for half the amount of the valuation. A rule having been granted according to the leave reserved, or for a new trial,

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R. Alexander showed cause. This action was maintainable upon the facts proved. *Foster v. Allanson* (a) shews that where, on a dissolution, partners account together and strike a balance, which is in favour of one, including several items due on a separate account, and the other expressly promises to pay it, an action of assumpsit lies on that promise. Here was no express promise, but in *Smith v. Barrow* (b), decided on the same day as *Foster v. Allanson*, Mr. Justice Buller seems to have thought only the striking a balance necessary. He says, "One partner cannot recover a sum of money received by the other, unless, on a balance struck, that sum be found due to him alone." And *Gibbs C. J.* afterwards held, in *Rachstraw v. Imber* (c), that no express promise was necessary, saying, "The dissolution of the pre-existing partnership, and the mutual settlement of an account, are a sufficient consideration in law for an implied promise to pay a balance on the side of the partner from whom such ba-

(a) 3 T. R. 479. In *Moravia v. Levy*, 2 T. R. 483, n. there was an express promise.

(b) 2 T. R. 476.

(c) Holt's N. P. C. 368.

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lance is due." In *Coffee v. Brian*(a) it was held, that though no balance was struck, money had and received might be maintained by one of three partners against another for money in his hands which had become separated from the partnership account. Here the joint property in the materials, &c. became separated by the agreement, so as to vest a moiety in the plaintiff. The fact that a balance was struck distinguishes this case from *Bovill v. Hammond*(b), where the plaintiff failed, as his demand arose out of a partnership transaction, nor had any account been stated between him and his partners. But this agreement respecting the materials is distinct from the other partnership concerns.

Secondly, the valuation was admissible without a stamp, for it was not binding on the parties, being merely made for their information, so as to guide their judgment on their agreement to take the materials, &c. lot by lot; *Atkinson v. Fell*(c). [Bayley B. When the materials, &c. were valued, the defendant was under no obligation to take the whole. Besides, as W. who made the valuation, was called to prove the value of the goods, he might speak of them from his recollection, refreshed by the valuation he had made, without any necessity to produce it, quâ appraisement and valuation, *Stafford v. Clark*(d).

F. Pollock in support of the rule. *Smith v. Barrow*, cited for the plaintiff, is an authority that one partner cannot sue another till a balance is struck between them; and *Fromont v. Coupland*(e) shows that that balance must be final of all the partnership accounts. There the plaintiff and defendant were coach owners, horsing a coach from *Bath* to *London*, the plaintiff

(a) 3 Bing. 54.

(b) 6 B. & C. 149.

(c) 5 M. & Sel. 240.

(d) 1 C. & P. 25, Burrough J. S. C. not S. P. 3 Bing. 377.

(e) 2 Bing. 170, 1 C. & P. 275, S. C.

finding horses for one part of the road, and the defendant for the other, the plaintiff receiving the fares, and rendering the defendant weekly accounts of them. They were held partners, and in an action by the plaintiff, for the use of his stables by the defendant, the latter was not permitted to set off a balance struck in his favour on the weekly accounts. Now here claims by and against the firm remained unsettled, as well as some of the partnership coal not valued or disposed of. [*Bayley B.* Nor in *Fromont v. Coupland* did the weekly account affect all the partnership affairs.] This verdict cannot stand, for no account was here settled, no division accomplished, no final balance struck, or promise to pay made, as in *Foster v. Allanson*; and the defendant's agreement is to take the materials, &c. at the price of the whole, and not at the moiety of that price here sued for. The valuation bound the parties as to the mode in which the property was to be divided, and could not, therefore, be admitted in evidence without a stamp.

BAYLEY B.—Upon the general rule of law there is no difficulty; it being clear that one partner cannot maintain an action against another on the partnership account till the accounts of the firm have been wound up, and the balance due from the partner to be sued to the partner making the claim is ascertained. But by special bargain between them, a particular transaction may be separated from the winding up of the general concern, and when thus insulated is taken out of the general law of partnership, constituting between the partners a separate and independent debt, on putting an end to their joint concern. That appears to have been the case here, and to have been so presented to the jury at the trial. Had these parties actually divided the different articles into two lots, ac-

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According to the first agreement, and the defendant had afterwards bought that belonging to the plaintiff, the plaintiff would have been entitled, in justice, to be paid for that his moiety of the joint stock. But on this evidence it may be that they agreed that defendant should take the whole partnership property in the materials and utensils valued, paying the value distinct from winding up the general partnership account. That appears to have been the nature of the bargain as left to and found by the jury, and I think it caused an implied obligation on the defendant to pay in money for the plaintiff's moiety of the materials and utensils before the final settlement of the general account. Nor is *Fromont v. Coupland* inconsistent with that view of this case, or with the other decisions cited; for the claim which the Court there refused to allow by way of set-off, was not on a bargain insulated in its nature, but on a balance of weekly accounts, of which there had been no settlement; and on which, as it did not appear that the partnership was ended, the balance in favour of one partner at the end of one week might be against him at the end of the next, or at the final winding up of the partnership accounts. Here it was by the agreement of a purchaser only that the defendant had acquired a right to take the separate possession of the partnership materials and utensils. In *Bovill v. Hammond* no account had been settled.

Upon the question whether the valuation made was admissible in evidence under 9 & 10 *Will. 3. c. 25. s. 59.*, it seems to me that stat. 55 *Geo. 3. c. 134. Sched. Part I.* does not apply, as the valuation was not binding on the parties, but merely for their mutual information, though its terms were afterwards adopted as the foundation of a new and distinct agreement of sale.

VAUGHAN B.—If any matter be withdrawn from the adjustment of partnership concerns, and made the subject of a distinct settlement, the general rule that one partner cannot sue another in respect of a partnership transaction, till the whole partnership concerns are adjusted, does not apply. This agreement was, in effect, found by the jury to be a transaction separate from the final settlement between the partners for the coal unsold, and the debts outstanding.

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GURNEY B.—The defendant being about to work a new coal mine, without his late partner in that business, required the utensils respecting which the agreement was made. The transaction was clearly separate from the rest of the accounts unsettled between the parties.

Rule discharged.

THOMAS against HEWES and Others.

TRESPASS against *Hewes* the land agent of *Earl Falmouth*, and the other defendants, his assistants, for acts committed in taking possession of a farm held under the earl. *H.* and *I.*, who acted as attorneys for the defendants, were also attorneys for the earl in a writ of inquiry, in which the latter was plaintiff and the present plaintiff defendant, and which was to have been

T., the tenant of *F.*, was plaintiff in an action of trespass against *F.*'s land agent for taking possession of *T.*'s farm, held under *F.* *H.* acted as *F.*'s attorney in several

suits pending between *T.* & *F.*, and also for the land agent in the action of trespass which was substantially defended by *F.*'s counsel, who held his general retainer, being claimed in that action by the attorney *H.* At the trial, *H.* having advised with the defendant's counsel, consented to an order of *nisi* prius imposing certain terms on *F.* It was afterwards moved to set aside the order, which had been made a rule of Court, on affidavits of *H.* and *F.* that *F.* never gave authority to consent to settle any action or matter in difference between them, but the Court refused to interfere in favour of *F.* in a summary way.

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executed on the 5th August last at Truro, and also in other suits at law and equity depending between the earl and the plaintiff. A retainer offered by the plaintiff to a counsel on the western circuit was returned, H. and I. having informed the plaintiff that the counsel had a general retainer for the earl. The cause having been entered for trial at the last summer assizes for Cornwall, came on to be tried on 3d August. Two counsel, both of whom held general retainers from the earl, appeared for the defendants, and were consulted by H. and I. before consenting to the following order of *Nisi Prius*:—"Thomas v. Hewes and Others.—It is ordered, by and with the consent of the parties, their counsel and attorneys, that the last of the jurors impanelled and sworn to determine this cause be withdrawn. And it is further ordered, by such consent as aforesaid, that the farm now held by the plaintiff of the Right Hon. Lord Falmouth shall be given up to the said Lord F. immediately, and that all the plaintiff's interest and claim therein shall henceforth cease and determine. And further, that all proceedings shall be staid in all suits and actions between the plaintiff and the defendants, and the plaintiff and the said Lord F., who by his attorney here in court consents to be a party to such rule. And it is also ordered, by such consent as aforesaid, that mutual releases shall be executed by the said parties, the expenses of such releases to be borne by the party requiring the same. And it is also ordered, by such consent as aforesaid, that the said Lord F. shall pay the taxed costs of this cause and the further sum of 10*l.*; and moreover it is ordered, that the court of Exchequer may be moved that this order may be made a rule of court."

On the 6th Aug. the town law agent of the earl wrote thus to the town law agents for the plaintiff:—"Earl Falmouth v. Thomas; Same v. Same.—Gentlemen, I

hear some attempt has been made to settle these actions, but as I am satisfied Lord *F.* will not enter into any compromise with Mr. *Thomas*, I now give you notice that he will not sanction any arrangement made without his express directions."

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On the subsequent 3d. *October* the following letter was written by the same person to the plaintiff's agents: "*Lord Falmouth v. Thomas*.—Gentlemen, That there may be no mistake between us, we beg to inform you, as we have before done, that Lord *F.* disavows any agreement which may have been made without his authority, and which the conduct of the defendant has justified."

On 5th *August*, *Hewes*, on behalf of the earl, demanded possession, pursuant to the terms of the order of *nisi prius*. Plaintiff then refused, unless he received ten pounds and a release from the earl; but on the 27th sent the only key there was, viz. that of the barn, to the defendant *Hewes*, as the earl's agent. The order of *nisi prius* was drawn up on 6th *November*, and served on the earl's town agents, as agents for the defendants, and notice of taxation was given them accordingly. But they, on behalf of the earl, protested before the master against such order, and against any taxation under it. The master then adjourned the taxation till the order of *nisi prius* had been made a rule of court. That having been done, a new appointment to tax was given, on attending which a similar protestation was made; but the master proceeded to tax the costs, and finished the taxation on 6th *January*.

On 21st *January*, *Coleridge* Serjt. moved to set aside so much of the order of *nisi prius* made in the cause, and the rule of court thereon, as related to Lord *Falmouth*. The affidavit of Mr. *H.* the earl's attorney, stated that he attended for the defendants the trial of the cause of *Thomas v. Hewes and others*. That terms being proposed, he consulted with the defendants'

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counsel, who both held general retainers from the earl, and that they, he, and the defendant *Hewes*, assented to the arrangement proposed; that he had no authority from the earl to negotiate for or settle the action brought by him against the plaintiff, or any other matter in difference between them, or to undertake for or consent to the payment of any monies by the said earl to the plaintiff on account of this or any other action, or that he should become a party to any order of *nisi prius* in this cause at the last *Cornwall* assizes. An affidavit of the earl also stated, that he did not at any time give any instructions whatever to his attorney Mr. *H.*, or any other person, to negotiate for or settle this action on the terms mentioned in the order of *nisi prius*, or any terms whatsoever; and that he did not instruct any counsel on his behalf, nor did he direct or authorize his said attorney, or any other person, to make any arrangement whatsoever for a settlement of this cause in any manner; and that he had not in any manner recognized or acquiesced in the arrangement or terms contained in the order of *nisi prius*, but expressly repudiated it on the first intimation thereof.

[*Bayley B.* Generally speaking, where an agent contracts for his principal, who disavows having given him authority so to contract, and successfully resists his liability on that ground, the agent stands in the place of the principal, and is personally liable (a). This rule, therefore, should be served on Mr. *H.* This motion should have been made within the first four days of last term, or at least as soon as the notice of taxation was served on Lord *Falmouth's* agent; therefore the rule should be now granted on payment by Lord *Fal-*

(a) See *East India Company v. Hawley*, 1 Esp. N. P. C. 112; *Fenn v. Harrison*, 3 T. R. 761; 3 P. Wms. 279; *Kennedy v. Gougeon*, 3 D. & R. 503; *Roscoe on Bills of Exchange*, 383; *Beauver's Lex M.* 43. As to the remedy against the agent in case for default, see *Polhill v. Walter*, 3 B. & Adol. 114.

month of such costs as the plaintiff has incurred since the 6th November.]

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Crowder showed cause on affidavits distinctly stating that *H.* and *I.* were Lord *Falmouth's* attorneys in all the causes mentioned in the order of nisi prius. Then no express authority from the earl to Mr. *H.* was requisite in order to authorize the latter to consent to that order; for, though Mr. *H.* had no instructions from the earl to enter into this particular arrangement, he had, as his attorney employed in the causes, a general authority to bind the earl in all of them. Whether *H.* and *I.* were the earl's agents pro hac vice, is a question between them and him. In *Filmer v. Delber* (a), an order of reference had been made with consent of counsel and attorney, and though the arbitrator had done no more than appoint a meeting, the defendant moved to set aside the order of nisi prius on an affidavit, stating that she had expressly desired her attorney not to consent to any rule of reference, the court refused the motion, saying, the defendant's remedy was by action against her attorney. In *Mole v. Smith* (b), Lord *Eldon* said, "It is for Mr. *Shadwell* to consider whether he is authorized to give his consent for his client. If he does, I must act on it, and she will be bound by it." If the consent of the counsel and attorneys on both sides is not sufficient in the absence of the parties themselves, great inconvenience will arise. The like if there can be no reference of all matters in difference. Though the earl's name is not on the cause list, he was the substantial party in the cause, and his general retainers was used to secure the services of the defendants' counsel. Assuming that the earl could disavow giving the authority, no distinct act of his appears,

(a) 3 Taunt. 436.

(b) 1 Jac. & Walk. 675.

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amounting to such disavowal, before 21st January. The first letter from his agent does not appear to have been in consequence of any communication with him. He should have applied to the associate or judge of assize to stay the order of nisi prius, or have moved early in last term to set aside the order, before it was made a rule of court. [Bayley B. In *Bodington v. Harris* (a), the action being for an alleged nuisance, the case was defended by the defendant's landlord, whose attorney entered into a consent rule to abate the nuisance without the defendant's consent, and against his express direction. The court, upon very strong affidavits that the grievance complained of was no nuisance, set aside an attachment on the consent rule, expressly guarding themselves against making a precedent of their decision in that case; thus impliedly admitting the general rule to be, that the attorney in a cause being present is competent to consent to its being referred to arbitration.] In *Rex v. Addington* (b) the motion to make an order of nisi prius a rule of court was resisted, on the ground of its being entered into without the consent of the party or his counsel; but the court said, "If an attorney exceed his authority, and his client be thereby prejudiced, the attorney is liable to make satisfaction to his client, but it is a matter of course to make an order of nisi prius a rule of this court." In *Furnival v. Bogle* (c) an order was made by consent of counsel, the solicitor on one side not being present, but his clerk only: there Lord Chancellor Lyndhurst said, "It was the duty of the solicitor, if he dissented from the order, to have given immediate notice of the objection," and suffering three days to elapse without objection was there considered too long an interval.

(a) 1 Bing. 167.

(b) Sayer's Reports, 259.

(c) 4 Russell's R. 146.

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Coleridge Serjt. in support of the rule. The motion is in time. The letter of 8th *August* was sufficient to put the plaintiff on his guard. [*Bayley* B. The proper course to be pursued by Lord *Falmouth's* agent would have been to have written forthwith to him to know whether he consented to or disavowed the reference. Having a doubt on the 6th *August* whether he would ratify the arrangement, why not write to him and get a categorical answer on the subject? The agent should have written to the plaintiff requesting him not to go out of the farm, or cease to cultivate it till Lord *F.'s* resolution was ascertained. It was unnecessary to wait till the order was made a rule of court in order to move to rescind the order.] Lord *F.* might well have considered that the plaintiff's refusal to give *Hewes* possession of the farm on 8th *August* showed that he did not intend to proceed on the order as to the grounds of refusal. It was the plaintiff's duty to tender the release for execution. The first notice which Lord *F.* received, that the plaintiff meant to enforce the order, was, on service of the first appointment to tax. The order was not then a rule of court, and the taxation was successfully resisted, nor was there another appointment to tax till after *Michaelmas* term. [*Bayley* B. If the plaintiff should apply for a *distringas* against Lord *Falmouth* for disobeying the rule (a), the court might refuse to proceed in that summary manner, on the ground that he never authorized his attorney to bind him, but the party might bring his action.] The giving an authority to an attorney to conduct a cause does not authorize him to refer it. [*Bayley* B. It is constantly done (b)].

(a) No attachment lies against a peer for not paying a sum of money under an award, *Walker v. Earl Grosvenor*, 7 T. R. 171.

(b) See *Bacon v. Duberry*, 1 Salk. 70; 2 id. 787; Id. Raym. 246; Holt, 78; Skinn. 179; 12 Mod. 129; Carth. 462, S. C. and cited arguendo *Barker v. Braham*, 3 Wils. 374. And see 1 Salk. 89; Dyer, 217, b.; *Biddell v. Dowe*, in error, 6 B. & Cr. 255.

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RAYLEY B.—There is no necessity in this case to lay down any general rule as to the power of counsel and attornies to bind their clients by consenting to terms on their behalf, for the application may be well decided by reference to its own circumstances. Though the counsel for the defendants might not have had authority to bind Lord *Falmouth*, the fact that they were consulted at nisi prius, shows that the reference which took place there was not made without consideration or able advice. The terms being agreed on, Lord *Falmouth* "by his attorney here in court," consented to be a party to the rule. The attorney is not stated to be Lord *Falmouth's* attorney in the suit, but generally as his attorney. Now this application is to set aside the order of nisi prius, on the ground that Lord *Falmouth* had given no authority to his attorney to do the act he did, and is therefore not bound by it. If we were to make this rule absolute, we should decide conclusively on the question whether an attorney has a general authority to bind his client in such a case; and if he has not, whether Mr. *H.* had, in the present instance, the authority of Lord *F.* to consent to this order. By so doing we should hinder, if not conclude the parties from obtaining the decision of the regularly constituted tribunal by which that question ought to be tried. I am not aware of any decision establishing our power to set aside the agreement of parties at nisi prius, and I am satisfied that it is not conferred by the statute 9 and 10 *Will. 3. c. 15*. It is said that we may interfere, as the order of nisi prius has been made a rule of court; but it is a different question whether the order should be enforced by attachment, or the party left to his action. The want of authority from Lord *Falmouth* to his attorney to enter into this arrangement, seems to me to be a question to be raised hereafter, in case of a *distringas* being moved for against the former for not performing the

award. Such a motion might be resisted by showing that though his attorney did consent to his being a party, it was without the authority of his employer. The court might then refuse the *distringas* and leave the plaintiff to his remedy by action. A jury would then decide the question, whether Lord *Falmouth* had given authority to Mr. *H.* to do what he did in this case in his name, and, as Mr. *H.* doubtless thought, for his benefit. An erroneous view of the law could in that case be set right on a writ of error; whereas by interfering in a summary way we should prevent a jury from deciding on the facts, and a court of error on the law. The lateness of the application is another reason against the rule, but I do not rest my judgment on that ground.

VAUGHAN B.—If I had been called on to decide whether Lord *Falmouth* was bound by what was done by his attorney when at the assizes, I should have doubted whether he was. This action being brought against the defendant for an act done as Lord *F.*'s land agent in the course of his employment, it may be considered as a cause in which Lord *F.* is substantially a party. But assuming him to be so, the attorney could not at the utmost bind him further than in that cause. An agent can only bind a principal while he acts within the scope of his authority; whereas here the attorney takes on him to refer not only this cause, which turned on an injury to the plaintiff's possession, but also other suits of more importance in which Lord *F.* was interested. But I rest my opinion against the rule on the lateness of this application, which was not made till the 21st *January*, though as long before as the 6th *August* Lord *Falmouth*'s agent was aware of the arrangement at the assizes, and the order of *nisi prius* was drawn up on the 6th *November*, and served on Lord

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Falmouth's town agent with notice of taxation. In the meantime the state of things may have materially altered to the plaintiff's disadvantage. Then, without deciding on the question of authority, this rule must be discharged, which will leave the parties at liberty to try the question in an action.

BOLLAND B.—Were we to act in the summary way pointed out by this rule, we should preclude the parties from trying the question in the proper mode. In cases of fraud or gross misconduct of the attorney, a court might set aside an order of court made on agreement of the parties. In *Furnival v. Bogle* the passing of the order was afterwards suspended, and finally superseded on affidavits stating circumstances to show that the plaintiff's counsel, when they consented to the terms in the order, had not been informed that their client had positively rejected the same terms when previously offered.

GURNEY B.—This application is made by a party who, by *H.* his attorney, consented to an order of *nisi prius*, supported by an affidavit of that very attorney that he had so consented without authority. It is not denied that in this action Lord *Falmouth*, if not the nominal, is the substantial defendant, and that Mr. *H.*, though not a party on the record, is the substantial defendant, and that Mr. *H.* is his attorney in the writ of inquiry and those other suits with the plaintiff mentioned in the order in which Lord *Falmouth's* name is on the order. Nor can it be doubted by whom Mr. *H.* was employed to defend this action, as he claimed particular counsel who had a general retainer from Lord *Falmouth*. Then, after consenting by attorney to this order at *nisi prius*, he comes as late as the tenth day of this, the second term, to set aside the order, without

even offering to put the plaintiff in the same situation in which he was previous to the arrangement at the assizes. It is impossible for us to do so now. In order to prevent the order of *nisi prius* from being made effectual, a specific notice should have been promptly given that Lord *Falmouth* would not consent. Active measures should then have been taken to stop all proceedings under it; instead of which, possession of the farm is demanded and given up in pursuance of it; nor is any step taken to invalidate it till after the notice to Lord *Falmouth's* agent of the second appointment to pay the costs. To grant this application, therefore, would be most unjust.

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Rule discharged with costs.

See *Wright v. Scruby*, post.

REX against MABERLEY.

AMOS (for the *Attorney-General*) moved for a rule absolute in the first instance, for a writ of immediate extent, to be tested on the day on which a fiat for an extent against the defendant was dated, viz. as far back as 22d February 1832. He cited a passage from *Manning's Exchequer Practice* (a), stating it to have been held, that an extent may issue at any distance of time after the inquisition and fiat, bearing teste on the day on which the fiat was granted. In *Rex v. Bruce* (b) a new extent issued three years after the original one, tested the day the latter had issued. The filing the affidavit of danger, and all the proceedings at the office when the fiat was signed, enabled every intermediate purchaser to know the existence of the extent.

A fiat for an extent having been granted more than a year before application for an extent, the court refused to grant a rule that an extent might issue tested of the day on which the fiat bore date.

(a) 2d edit. *Revenue Branch*, 26.

(b) *Id.* 27, n.

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BAYLEY B.—Regularly the extent should bear date the day it issues. More than a year has here elapsed since the fiat bears date. The crown is in this case within the maxim, *vigilantibus non dormientibus subveniunt leges* (a). Assuming that the parties interested, who may be remote vendees, should search the files, they might well conclude that the teste of the fiat being the day on which an extent might be issued, was the day on which that proceeding, if issued at all, would have issued. In *Rex v. Bruce*, and the cases cited in *Manning's Practice*, there had been previous extents (b). In *Rex v. Bruce*, **Wood B.** thought, that if extents were suffered to be ante-dated, it might affect intervening transactions, and disturb property in the hands of remote vendees. In *Giles v. Grover* (c) several of the judges repeatedly laid it down that an extent ought not to be ante-dated.

Amos took nothing by his motion.

(a) Hobart, 347.

(b) And see *Rex v. Harvey*, 7 Price, 238, contrary to those cases.

(c) 1 Cl. & F. 72; 9 Bligh. 120; M'Lell. & Y. 232.

**STRICKLAND against MAXWELL Esq., Sheriff of
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A printed instrument purporting to be a form of demise of a farm, had originally contained in the habendum words creating a tenancy from year to year, but on producing the instrument in evidence they were found to be struck through, and were proved to have been so struck through before execution of the instrument by the party charged. The remaining words of demise were "for the term of one year fully to be complete and ended," and stood immediately preceding those which had been struck out. However, many subsequent stipulations remained in the leases, which seemed to be only applicable to a tenancy for longer than a year, or determinable by notice to quit:—Held, first, that the words struck

TRESPASS for breaking and entering the plaintiff's house, stables, outbuildings and closes, breaking

doors and gates, &c., seizing, mowing, and taking possession of his crops, trampling corn and grass, prostrating trees, hedges and fences, filling up ditches, and hindering the plaintiff from having the use and enjoyment of his farm. Second count, for an expulsion from certain closes named. Third count, for an expulsion from a dwelling-house, stabling, and outbuildings. Fourth count, *de bonis asportatis*. Pleas: not guilty, and several special justifications by defendant *Maxwell* as sheriff of *Yorkshire*, and the other defendant as his bailiff, under an execution against *John Thomas* and *Robert Smith*. Issues thereon. The cause was tried before *Denman C. J.* at the *Yorkshire* summer assizes 1833. The plaintiff was landlord of a farm let to *Thomas Smith* by the following instrument of demise, dated 4th *November* 1831, which was produced at the trial, signed by *Thomas Smith*. The plaintiff agreed to let to the said *Thomas Smith* the farm and premises (upon which the supposed trespasses were alleged to have been committed) from the 6th day of *April* then next, for the term of one year fully to be complete and

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through might be looked at to ascertain the real intention of the parties in so erasing them, and consequently that the tenancy was for one year only; and next, that the stipulations inapplicable to such a tenancy must be considered as struck out, or as surplusage, unless the tenancy should continue for more than a year.

By the same instrument of demise, after a covenant for payment of rent by the tenant, it was agreed "that in case the tenant should duly observe and perform the several covenants and agreements thereinbefore contained on his part and behalf," and should peaceably quit the farm in pursuance of notice to do so, he should be entitled to a way-going crop to be taken from lands in seeds or turnips the previous summer, such crop being to be left for the landlord or his incoming tenant at a valuation to be made by arbitrators or an umpire:—Held, that this clause did not give the tenant the right of possession of the land to the exclusion of the landlord, after the determination of the year's tenancy, but at most only a right to go on the land to improve the crop; and that the landlord might maintain trespass *quare clausum fregit* for taking possession of the crop and hindering him from having the use and occupation of the land after the year expired.

Whether the payment of the rent was a condition precedent to the tenant's having the right to the way-going crop, *quære*.

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ended (a), under certain rents, payable by two equal half-yearly portions, on the 11th day of *October* and the 6th day of *April* in each year. By the said agreement the said *Thomas Smith* agreed with the plaintiff to pay the rents and taxes, to keep the premises in repair, not to plough up the grass land, and that he would not take more than two crops of any corn or grain successively from any part thereof, but would fallow, as therein mentioned: Provided always, that upon light lands, or such as were adapted to the turnip and seed husbandry, the said two crops should not be taken in immediate succession to each other, but the said *Thomas Smith*, his executors or administrators, should upon such lands sow his or their first crop of corn after turnips with a sufficient quantity of good grass seeds, which might lie one, two, or three years, at his or their own discretion, if he or they should so long continue to occupy the said farm and premises.

The instrument also contained (amongst several other clauses usually inserted in leases) the following clause as to quitting the premises.

“And that the said *Walter Strickland*, his heirs or assigns, or his or their incoming tenant, at any time after the 1st day of *January* preceding the 6th day of *April*, when the said *Thomas Smith*, his executors or administrators, shall have given or received notice to quit the said farm and premises, shall have full liberty to enter upon and to plough and cultivate all the arable land except the fallows or turnip fallows of the preceding summer; and also shall have the use of the stables of the said farm and premises, and shall have liberty to sow with seeds and harrow in the same, or any part or

(a) Here had followed the words “and so on from year to year until either party shall have given six months’ notice determining this agreement,” but they had been struck out before *Thomas Smith* signed the instrument, which was a form printed with blanks, afterwards filled up for use.

parts of the fallow or turnip lands from which a way or off-going crop is to be taken, as is after-mentioned."

It also contained a clause that the tenant shall be allowed the cost price of all seeds sown by him the preceding year, if not eaten by sheep or cattle. A clause as to the way-going crop was as follows :

"And the said *Walter Strickland* doth hereby agree, that in case the said *Thomas Smith*, his executors or administrators, shall duly observe and perform the several covenants and agreements hereinbefore contained, on his and their part and behalf, according to the true intent and meaning thereof, and shall also duly and peaceably quit the said farm and premises in pursuance of any such notice as is hereinbefore mentioned, he or they shall be entitled to a way-going crop of corn not exceeding sixty acres, to be taken from such parts of the land in tillage as shall have been in seeds, fallow or turnips, (eaten off with sheep) the preceding summer. And if there shall not at the time of quitting be so much land which has been so fallowed or turnip fallowed; then the deficiency shall be taken from such of the lands then in seeds as shall fall in due course to be then ploughed out: and which way-going crop, it is hereby agreed between the parties hereto, shall be left for the said *Walter Strickland*, his heirs or assigns, or the incoming tenant, at a valuation to be made by arbitrators or an umpire in the manner herein mentioned, but subject to reduction therefrom of 1s. 8d. per acre for the onstand and taxes of the land on which it shall be grown, and also allow for the expenses of reaping, thrashing, and delivering the said crop."

In *March* 1833, two executions issued against *Thomas Smith* and two others, under which the whole of *Thomas Smith's* crops and effects were seized. The sheriff's officers gave notice of having taken possession to the plaintiff (the landlord) and his known agent, pursuant

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to statute 56 *Geo. 3. c. 50. s. 2.* The agent then gave notice to the sheriff that rent was in arrear from *Thomas Smith*. The furniture, cattle, farming implements, and all the moveable effects of the defendants were sold by auction on the 6th and 7th *April* 1833, and on the last day's sale the sheriff paid to the plaintiff's agent the rent which was then due. The produce of the sale was insufficient to satisfy the execution first issued in *March*, as the sheriff had to satisfy a prior execution for 200*l.* On the 3d *May* last the manure and fixtures were valued by two persons, one appointed by the plaintiff, the other by the sheriff, and by an umpire chosen by the arbitrators. The value awarded was afterwards paid to the sheriff. At that time, viz. (before this action was commenced) the sheriff offered to give up to the plaintiff possession of the grass land, and of such of the arable land as the tenant had no right to for his way-going crop, and in respect of which he was not entitled to any remuneration for ploughing or sowing with corn; but the plaintiff's agent demanded possession of the whole, as well as of the growing crops belonging to the tenant, denying the tenant's right to have any way-going crop.

The plaintiff was excluded from possession of any part of the premises, and no rent since accruing due had been paid; *Hoshins v. Knight* (a). For the defendants it was contended, first, that a continuing possession by *Thomas Smith* was contemplated for longer than a year, and could only be determined by a notice to quit; and also, that having a right to a way-going crop, he was entitled to possession of the soil on which it grew, as there was no evidence that the covenants affecting the right to it had not been performed. The chief justice directed a verdict for the plaintiff, giving

(a) 1 M. & S. 245.

leave to the defendants to move to enter a nonsuit. The trespasses were on 3d *March* 1833.

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Jones Serjt. having obtained a rule accordingly in *Michaelmas* term,

John Williams, Cresswell and *R. C. Hildyard* showed cause. Those words of the habendum which, as they originally stood in the printed form of the agreement for a lease, gave it the effect of a tenancy from year to year, having been struck out, the words of demise remain, "for the term of one year fully to be complete and ended," in which case no notice to quit is requisite. So far all is clear; but the difficulty arises from the oversight of retaining a number of stipulations which are applicable to the longer term of a tenancy from year to year, for which they were originally intended, but are not suitable to the shorter term created by the instrument. The intention of the parties to abridge the duration of the term, as it stood in print, is however clear; and the habendum, as moulded by the erasure, equally so. Indeed the act of erasure shows more strongly their intention to exclude a longer tenancy than for a year; but it will be argued that the particular covenants which remain, *e.g.* not to take more than two crops successively; and as to the first crop of corn after turnips &c., show that this instrument confers a tenancy from year to year, not determinable till the end of three years at least. That construction would alter the duration of the term contemplated by the parties, and plainly expressed by them in the habendum. *Doe d. Spencer v. Godwin* (a) is in point. There a lessee covenanted not to assign the premises without leave of lessor, "provided always that if any of the covenants

(a) 4 M. & S. 265. See *Crisp v. Price*, 5 Taunt. 548.

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hereinafter contained on the part of the lessee shall be broken, it shall be lawful for the lessor to re-enter." There was no covenant on the lessee's part after the proviso; and it was held, that the lessor could not enter for breach of the covenant not to assign; for the word *hereinafter* could not be rejected; and as it could not be seen with certainty what was the intention of the parties, the only safe rule was to adhere to the words (a). [*Bayley* B. In that case it might have been that there were originally subsequent covenants which were struck out, without also erasing "*hereinafter* contained."] The habendum being express, should prevail over any inconsistencies, which can only arise by implication, after comparing it with other ambiguous parts of the instrument. In the *Touchstone*, 52, its office is said to be "to set forth what estate the grantee shall have, and for what time he shall hold the thing given or granted;" in *Co. Lit.* 6 a. "to name again the feoffee, and to limit the certainty of the estate, (viz. that granted by the premises of the deed)." The general implication of the estate which shall pass by construction of law by the premises, is always controlled and qualified by the habendum (b). It may also alter and abridge the certainty of the estate, *Stakeley v. Butler* (c). In *Baldwin's case* (d) Lord *Coke* says, "Note, reader, a difference between an estate in the premises implied, and an estate expressed; for, if A. grant a rent to B. generally, the same by implication and construction of law is an estate for life; but if the habendum be for years, it is good, and shall qualify the

(a) See Mr. Justice *Bayley's* judgment.

(b) See also *Buchler's case*, 2 Rep. 55 b.; Vin. Ab. tit. Grant, (1 a.); *Co. Lit.* 183 a.; *Earl of Shrewsbury's case*, 9 Rep. 47 b. 49 b.; and see *Thomas's* note, 1 Rep. 478, new edit.

(c) *Hobart's R.* 170, 171. As to the habendum frustrating the estate, see *id.* and 1 East, 506.

(d) 2 Rep. 24 a.

generality and implication of the premises." No implication shall be admitted to overthrow an express clause in the deed (a). Again, the habendum must prevail in respect of its priority to the part supposed to be inconsistent with it. If there are two clauses or parts of a deed, repugnant the one to the other, the first part is to be reserved and the latter rejected, except there be some special reason to the contrary. See the *Touchstone*, 88, c. 5. Rule 7. *Thomas v. Howell* (b), *Haws v. Haws* (c). However, the clauses which are referable to a tenancy from year to year, are not necessarily inconsistent with the habendum. They would be operative if the tenant remained in possession more than the year; and the chief justice at the trial inclined to the opinion that the instrument operated as a demise for a year certain, and that the stipulations must be taken to have been retained in case the holding continued. [Bayley B. Any part not inapplicable to the relation between a landlord and a tenant from year to year may have operation.] Next, did the tenant's right to the possession remain, under the clause for the way-going crop? If the tenant had a right to that crop, the clause in question did not give him a right to possession even of the land on which it stood; but to be remunerated for seed, labour, and expenses, on payment of the rent and performing the covenants. Now rent appeared to be in arrear, and *Porter v. Shepherd* (d) shows the payment of it to have been a condition precedent, without performing which no right to the crop could exist. [Bayley B. Might not *Smith*, as tenant from year to year, be entitled to cultivate the land for the way-going crop, for which he is to be paid at a valuation?]

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(a) Bac. Abr. tit. Grants, (I.)

(b) 4 Modern, 69.

(c) 3 Atkyns, 525.

(d) 6 T. R. 665 (in error from C. P.)

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Jones Serjt. and Alexander in support of the rule. This was a continuing tenancy not determined by proper notice to quit. No argument is admissible if founded on the words which are struck out. The instrument must be construed on its own expressions as it now stands, without reference to any fact or declaration extrinsic to it. For if the declarations of the parties at the time of executing a written instrument would not avail to vary its effect, neither can their act at that time be evidence for that purpose. The intention of the parties is to be gathered from the whole of an instrument, not from an isolated expression in it; and if any difficulty in so doing arises from the nature of conflicting clauses, that construction must be adopted which will give effect to the greatest part. Then, if on regard had to the whole instrument it is found clear that the tenancy was from year to year, or for more than a year, if notice to quit was not given within the year, the expression in the habendum will not restrain its operation to a year. It is argued that if there is not a demise for one year only, it must be a demise for three years at least; but no words in the habendum limit the tenancy to that duration. If the habendum is to be read as a demise for one year only, that was to be subject to the contingency whether notice to quit was given in the first half-year; for it appears from the other parts of the instrument that such an interest was intended to be granted as should continue till determined by a notice. [*Bayley B.* This instrument conferred an absolute unqualified term and lease for one year. The tenant had the same rights as if it had been a tenancy for ten years, of which this was the last; he might prepare the land for the next year's crop, so as to be taken at a valuation, if he had paid his rent. I think we have a right to look at the instrument as it originally stood, viz. for one year, and so on from

year to year. We find on the face of the instrument, that those words which would have given the tenancy a longer duration than a year are struck out. Covenants follow applicable to that longer tenancy which the erased words would have created, and inapplicable to the state of things which that erasure had substituted in their place. Then ought we not to consider every thing inapplicable to the tenancy from year to year as struck out, and so much only to remain in the instrument as is applicable to the tenancy created? May not the plaintiff say, the lease was originally meant to operate one way and was afterwards altered to another? That would be to vary the effect of the instrument, because words were once contained in it which are not there now, and were not there at the time of its execution. But no fact so appearing can alter the effect of the instrument itself, it being as much dehors it, as if contained in a separate paper. [*Bayley B.* A court of error might give an opinion on the real construction of that document; for a fac simile might be put on the record, or the fact might be found what words stood originally, what words were struck out, and what others were written in their stead.] That would be to explain a written instrument by parol. Suppose words to be written on an erasure, could more effect be given to them, because they were proved not to be in the original, but appeared to have been since substituted by the parties on more mature advice? Suppose that the words are so completely erased that they cannot be decyphered, is the party to lose any advantage he might have had if they could? These are necessary consequences of the doctrine contended for by the plaintiff. The fair construction of the whole is, that the parties contemplated a tenancy which might continue beyond a year; viz. that the tenant was to have the farm for one year certain, and then from

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year to year, unless notice to quit given. Besides, if the terms of a lease are doubtful, it is a rule that the construction is to be in favour of the lessee, who is considered as grantee; *Dann v. Spurrier* (a), *Comyn's Landlord and Tenant* (b), *Lilley v. Whitney* (c), *Seaman's case* (d). Every deed shall be most strongly construed against the grantor, and the grantee shall take by the premises, if they be more for his advantage; so if the construction be doubtful, the deed must be favourably expounded for him (e). In *Wright v. Dickson* (f) the material word *coals* had been omitted from the lease, but being clearly an omission, was introduced into it by the court as was plainly intended by the parties, on the ground that where a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it be introduced, such lease may be construed as if it were so inserted, although the particular passage where it ought to stand conveys a distinct meaning without it. [*Bayley B.* Equivocal words there received a construction. The words used were "great chows" and "panwood," meaning small refuse coals; and the House of Lords held, that they included great coals also. There are many cases to show that a particular word omitted by mistake, but found essential to the context, may be supplied, after first showing that it is required by the context.] Here one of the stipulations in question is wholly inconsistent with a tenancy for one year only; for instance, half a year's notice, though fit for a yearly

(a) 3 Bos. & Pul. 405, relied on by Lord Ellenborough in *Doe v. Dism*, 9 East, 15; and see *Dann v. Spurrier*, in Chancery, 7 Ves. 231. *Hall v. Richardson*, 3 T. R. 462; *Ferguson v. Cornish*, 2 Burr. 1034, are contra. See also *Price v. Dyer*, 17 Ves. 363.

(b) 1st edit. 81, 106.

(c) *Dyer*, 272 a.

(d) *Godbolt*, 166.

(e) 2 Rep. 23.

(f) 1 Dow's Parl. Cas. 141; see Lord Eldon's judgment.

tenancy, is wholly inapplicable to a tenancy for a year only.

Secondly, it is contended, that the tenant was to have not the value of the crop only, but the crop. For by the agreement he had clearly such a right to the way-going crop as would include a right to enter and take it; and if he had any such right of possession the plaintiff had not that possession which would entitle him to bring trespass against the sheriff. *Crosby v. Wadsworth* (a) shows that *Smith* had such an interest in the land as would support trespass. [*Bayley* B. That case applied to grass, the natural produce of the land (b); but here on the 18th April, after this year expired, the defendants locked up not only all the gates of the fields containing the way-going crops (c), but of the homestead also. *Smith* was on the farm on the 6th April. Going to the land and demanding possession constructively vests the right of possession in the party entitled to it. The possession of the wrongdoer must be actual. Even admitting the outgoing tenant's right to get his crop, that was an easement in him for that purpose only; but the general right of the landlord may remain to bring trespass for other acts done to the close, *e. g.* for placing stones there, or for using it as a way to get stones from it.] To hold that the payment of the rent and the performance of the covenants formed a condition precedent to the right to the way-going crop, would entail this consequence, that if a shilling of rent was in arrear for a single day, the tenant would lose the whole benefit of that crop. *Holding v. Pigott* (d) decides, that if the lease contain

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(a) 6 East, 602, 609; see Co. Lit. 4 b.

(b) And see *Tomkinson v. Russell*, 3 Price, 287; *Stammers v. Dixon*, 7 East, 200.

(c) A complete taking possession by the sheriff. See per *Richards* C. B. 9 Pri. 290.

(d) 7 Bing. 465.

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no stipulations as to the mode of *quitting*, the off-going tenant is entitled to his way-going crop, according to the custom of the country, though the terms of *holding* be inconsistent with such a custom. *Boraston v. Green* (a) was also cited.

BAYLEY B.—I am of opinion that this rule ought to be discharged. The first question in the case arises on the construction of the agreement of demise between the plaintiff and *Smith* his tenant; viz. whether the agreement operated as a demise for one year only, or for a longer period not determinable without a notice to quit. I am of opinion that it created a tenancy only for a single year. The habendum is the proper place to be looked to in order to ascertain the intended duration of the tenancy, because it generally fixes the time for which the lessor grants that the lessee shall enjoy the demised premises. But I agree with my brother *Jones*, that you may look at other parts of the instrument, and if you see that the tenancy is to endure for a longer term than that specified in the habendum, the other parts of the lease may control the habendum. But that must be a very strong clear case, in which it must be apparent from those other parts of the lease, that the parties could not have meant the habendum to have no operation for the time specified by its wording. Now in this case the habendum is to hold the farm and premises from the 6th *April* then next, "for the term of one year fully to be complete and ended." That in terms is a lease for one year, and one year only. But it is argued, that from other parts of the instrument which seem to contemplate a longer duration of the demise, and to make provisions which could only be applicable to such longer demise, the parties must have intended that the lease was not to expire at the period mentioned in the habendum,

(a) 16 East, 71.

but was to go on for a longer time, until some notice to determine it should be given. Now in order to decide whether this was the intention of the parties or not, and what was their intention as shown by the erasure, we have a right to look at the instrument as it originally stood, and at the alterations since made in it, to see how those alterations illustrate the point in question. The instrument is printed in by far the larger and more material parts; those printed parts including the stipulations which appear to be inconsistent with a tenancy for a single year. It is competent to us to look at what was originally the printed matter, and also at what alterations are introduced in those its original provisions, by erasure or striking out; for these matters are apparent on the face of the instrument, and we do not go out of it or receive any parol or other evidence dehors its own provisions. Now the habendum in the printed form stood originally for the term of one year fully to be complete and ended, "and so on from year to year, until either party shall give six months' notice to dissolve this agreement;" and when I find those words obliterated, then I see on the face of the instrument itself, that the intention of the parties making this agreement was, not that it should continue till six months' notice should be given by either party, but that it should determine with the single year, as if "and no more" had been subjoined to "ended" in the habendum. I consider myself bound to consider this instrument as a demise for one year only, subject to all the stipulations contained in it applicable to such a tenancy. Those parts of it which were originally introduced in contemplation of a lease lasting longer than a single year, must be considered as having been virtually expunged by the expunging those previous words which would have raised such longer tenancy; consequently I am of opinion that the tenancy ended at the expira-

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tion of that one year, at which period the plaintiff had at all events the immediate right of possession of all parts of the farm to which the clause as to way-going crops does not apply.

Secondly, the question what interest, if any, was conferred on the tenant in that part of the premises to which the clause for a way-going crop extended, is not perhaps necessary to be considered in order to discharge this rule; for the defendants' acts have exceeded any rights which the tenant *Smith* could possibly have had under that clause; and though they once offered to give up the possession of all the farm, except that containing the way-going crop, upon the plaintiff's complying with certain terms, they, in fact, did not give it up, and withheld the whole. Now by the clause as to the way-going crop, the plaintiff agrees that if *Smith* performs the covenants thereinbefore contained, according to the true intent and meaning thereof, he should be entitled to the way-going crop. It is not necessary to give any opinion whether the words "in case *Smith* should have observed and performed the covenants and agreements according to the true intent and meaning thereof," constitute a condition precedent to the tenant having a right to the way-going crop. The language and its position tend strongly to show that they were intended to constitute a condition precedent; but it would be unreasonable that the non-payment of a minute portion of the rent should deprive the tenant of remuneration for his expenses and labour about that crop. But if the tenant is entitled to the way-going crop under the clause, still these defendants were not justified in keeping possession of the land. The clause does not confer on him power to reap the crop, or any distinct interest in it, of which he may dispose, or any right to suffer any one to take the crop but the landlord. It is in reality a provision which enables the out-going tenant to obtain compensation from the

landlord and in-coming tenant for the husbandry, seed and manure bestowed by him on the land, the fruit of which he is himself prevented from taking by the expiration of his tenancy. The landlord is to have the crop at a valuation. Though it is true that the time at which the valuation is to be made is not stated, it ought to take place at the time the tenant quits, or when the crop is reaped; but whenever it is intended to make it, the landlord should be applied to, to appoint a valuer to act for him, and that it may be fixed by the estimate of the arbitrators, or an umpire. In this case no application to value the crop appears to have been made by the landlord or tenant; the case, therefore, stands on this clause as if none had taken place, but as if the landlord were to be entitled to take the crop at a valuation to be subsequently made. Then the landlord might take the crop and do what he would with it, when the valuation was made; whereas the tenant, till that takes place, had only a right to do acts which might tend to improve the crop, *e. g.* weeding, &c. but had no right to lock gates or exclude the landlord, except he should deteriorate the crops, or prevent his tenant from doing any thing on the land not injurious to them. I am, therefore, of opinion that the conduct of the defendants in locking up not only the homestead, but the gates of the fields in which the crops were, and thus preventing the landlord from entering them, when he might have had an object in view wholly foreign to injuring the crops, cannot be justified. The rule must therefore be discharged on both points.

VAUGHAN B.—I am of the same opinion. The question is, whether the plaintiff had actual or constructive possession of the farm? He must have one or the other, in order to sustain trespass (*a*). The de-

(c) See *Topham v. Dent*, 6 Bing. 516.

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Defendants contend, that on the real construction of the instrument of demise the tenant had an interest beyond the year. The instrument must be construed according to the intent of the parties, collected from the terms used in it. The printed form originally used contemplated a tenancy to endure beyond the first year; but on looking at the instrument as it now stands, it appears that before it was signed the important words which would create a tenancy for longer than a year were struck out. I am of opinion that we may look at the words thus struck out before the instrument was executed, to see what the intention of the parties was in doing so. The fact of erasure might be proved and explained; and if that fact can be proved, an inference may also be drawn from it. The inference here is, that these words were purposely excluded by the parties, in order to prevent the tenancy from continuing for longer than a year. The words appear to me not ambiguous, as has been contended by Mr. Alexander, but express; and, therefore, not controllable by implication in favour of the grantee. I think, that after having struck out the words originally in the habendum of this lease, those stipulations which were suffered to remain, though only applicable to a tenancy for more than a year, became surplusage. Then the right of possession would vest in the plaintiff at the end of the year, without six months previous notice to Smith to quit, for the purpose of determining his tenancy. As to the way-going crop, without deciding on the alleged condition precedent to the tenant's right to it, I do not think it can be fairly intended that the tenant should have possession of the crop; he paid value for raising it, and he was to have that value again, not the crop. All deductions from its value for poor-rates, as well as thrashing and delivering it out, would be thrown on the landlord or in-coming tenant,

one of whom must harvest it. The out-going tenant, therefore, was under no necessity to go on the land for the purpose of getting the crop; but if he were, that would only give him an easement in the land, without any right in it, and the right of possession is in the landlord. My judgment, however, rests on the plain wording of the instrument in question.

1834.

STRICKLAND
v.
MAXWELL
and Another.

GURNEY B.—The terms of the habendum are too strong to admit a doubt, but that the intended tenancy was for a year only, and not from year to year. The effect of the subsequent stipulations of the lease was destroyed by the erasure of the previous words, to which only they could be applicable; at most they could only be applicable if the tenancy lasted for longer than a year. On the other point it is clear that, under the terms of this instrument, if the tenant was entitled to the value of the way-going crop, he was only entitled to that value, and not to the possession of the land on which it stood. Then the defendants had no answer to this action, for they had kept possession of the land and homestead.

Rule discharged (a).

(a) Lord Lyndhurst was sitting in equity, and Bolland B. at nisi prius.

1884.

RYALLS *against* EMERSON.

By order of a baron, made pursuant to 2 Geo. 2. c. 23. s. 23. proceedings in an action on an attorney's bill were staid on payment of what should be found due by the master, without embodying in the order the defendant's submission or undertaking to pay the sum which should be found due on taxation. He, however, signed the usual submission to that effect in the book kept for that purpose at the baron's chambers. On the taxation an allocatur was made in favour of defendant for 6*d*. That taxation was reviewed under an order granted by another baron, and the master then made an allo-

ASSUMPSIT by an attorney for his bill. A baron's order was granted for staying the proceedings and taxing the bill, which was, however, drawn up without the usual undertaking to pay what was found due by the master, and without any direction to the defendant to pay what was found due, but merely ordering a stay of proceedings on payment of what was found due by the master. The defendant signed the usual undertaking in the book kept for that purpose in the judge's chambers. On the reference the master made an allocatur of 6*d*. in favour of defendant. That taxation was ordered to be reviewed by order of another baron, after a hearing before him on affidavits. On the reviewed taxation the master found 18*l*. to be due from the defendant to the plaintiff, and made his allocatur accordingly.

Heaton for the defendant, moved to set aside the order to review, which had been made a rule of court, and the master's allocatur thereon, on affidavits alleging that the master's finding was incorrect, and stating fresh facts. A rule having been refused,

Crompton for the plaintiff, moved for an attachment for not paying the costs pursuant to the master's allocatur, on affidavits stating that the costs had been previously demanded, and that the allocatur and order for review had been served on defendant.

for 18*l*. to the plaintiff. The plaintiff made that order a rule of court, served it on defendant, demanded the costs, and, on non-payment, obtained an attachment without making the original order of submission in the judge's book a rule of court:—Held, that the attachment issued on insufficient materials, and the court set it aside accordingly; but they afterwards upheld another attachment obtained after the first order and submission had been made a rule of court: both rules having been served on defendant, and a fresh demand of the costs made.

At the defendant's request the attachment was ordered by the court to lie in the office for a few days, in order to give him an opportunity to pay the sum in the allocatur.

1834.

RYALLS
v.
EMERSON.

Heaton then obtained a rule to set aside the attachment for non-payment of that sum, on the ground that as neither the original order to stay proceedings, (which had not been made a rule of court,) nor the order for reviewing the taxation, contained any direction to the defendant to pay what should be found due, or any consent on his part to do so, no contempt had been committed. He said that the defendant was ready to plead, and go on in the action. The court refused to hear any of the merits, saying, they had been disposed of by the master; but asked whether the original undertaking had not been filed at the judge's chambers.

Crompton shewed cause against the rule to set aside the attachment. It is sufficient that the defendant signed the usual undertaking in the book kept at the judge's chambers. For the statute 2 Geo. 2. c. 23. s. 23. merely directs, that upon the submission of the party chargeable by the bill unto a judge of the court, and to pay the whole sum that upon taxation of the said bill shall appear to be due to the attorney, the judge shall refer the bill to be taxed and settled by the proper officer. It does not direct that the defendant's submission to pay shall be in the judge's order of reference. Then that submission was properly made in the book kept at the judge's chambers, that being quasi the record of it, according to the practice upon the words of the statute, "shall submit." If, in very recent instances, at the chambers of some of the learned judges, the submission has, from abundant caution, been in-

1881.

RYAN

v.

KEMMER.

serted in the order, it does not appear requisite. The taxation on the second order must be taken to be a continuance of, and contingent on the first. The submission applies to both equally. The authority of the baron, under the act, to make the original order to stay proceedings, was proved by the affidavits that the usual undertaking in the judge's book was signed by the defendant. Then the other baron might order a review of the taxation which had taken place under the first order, so that any mistake of the officer might be rectified. [*Bayley B.* If that is so, the original order is not made a rule of court; we do not say whether it is necessary or not.] It was not necessary, for the first order was recited in the second, which was made a rule of court, and the breach of which is the contempt for which the attachment was moved for. That order must be taken to have been made a rule of court on good authority. Besides, the motion is against good faith; being made after the attachment was stayed in the office, to give the defendant time to pay.

Heaton in support of the rule. The uniform practice is, that the defendant's consent should appear on the order itself. [*Bayley B.* Where the suitor's consent is not obtained, the order is taken and not acted on till the undertaking is entered in the book. Then the defendant had no authority to act on the order unless he had consented. (a)]

Cur. adv. vult.

BAYLEY B. afterwards delivered the judgment of the Court.—This rule sought to set aside an attachment which had issued for non-payment of costs pur-

(a) The learned baron cited *Dickins v. Jarvis*, 5 B. & Cr. 586.

sustit to the master's allocatur. We are of opinion that the attachment issued on insufficient materials, and that this rule must therefore be made absolute. To found the proceeding by attachment for contempt, some rule of court must be disobeyed. In this case only one of the orders, viz. that for reviewing the taxation, was made a rule of court. The allocatur was made on that order only; that is the only rule which has been served, or on which a demand has been made in order to bring the defendant into contempt; but it does not show the terms of the original order, or that there had been a submission in the judge's book. Neither the original order by which the bill was referred to be taxed, nor the submission in the judge's book, were made a rule of court, nor did the original order contain the usual undertaking and submission of the party to pay.

The party who drew up the original order for taxation must be taken to have consented to that taxation taking place under 2 Geo. 2. c. 23. The defendant will probably act wisely in now paying the money; as we think that on making the original order, and the submission in the judge's book a rule of court, and serving the defendant with that and the subsequent order for reviewing the taxation, an attachment would lie to compel the payment.

Though it has been pressed that the present motion is against good faith, the dates shew that objection to be ill founded; for the attachment was moved for on the same day that a rule for setting aside the order for reviewing the taxation and the allocatur was refused. The Court directed it to lay a few days in the office, in order to give the defendant an opportunity to pay; but there could not have been at that time any waiver of the insufficiency of the materials for the attachment, for the defendant could not have had any opportunity

1844.

 RYALLS
 v.
 EMERSON.

1834!

RYALLS
v.
EMERSON.

of knowing what they were. As the attachment issued on insufficient materials, the rule for setting it aside would have been made absolute with costs; but as, it does not, pray costs, it must be absolute without costs. The money paid into court must be returned.

Rule absolute accordingly.

The original order and submission in the judge's book were afterwards made a rule of court. The plaintiff served both rules, the allocatur &c., and made a fresh demand, whereupon another attachment was issued against the defendant.

A rule was then obtained by *Heaton* to set aside that attachment, on the same grounds of the insufficiency of the original order, as materials to support an attachment. *Crompton* shewed cause.—Rule discharged with costs.

WILLIAMS *against* WILLIAMS.

No affidavit of merits is required where the execution of a writ of inquiry is set aside on the ground of irregularity in not giving notice of the inquiry.

RICHARDS had obtained a rule for setting aside the execution of a writ of inquiry for irregularity, in not serving the notice of executing the writ of inquiry till the day it had been executed.—*Tomlinson* showed for cause that the defendant's affidavit merely stated, "that he had merits and a good defence to the action," and not "that he had a good defence on the merits," in the correct way (a).

Per Curiam.—No affidavit of merits was requisite in this case, where the plaintiff was irregular in his proceedings, and executed a writ of inquiry without giving the regular notice.

Rule absolute.

(a) See *Westerdale v. Kemp*, ante, Vol. I. 260; *Grüttick v. Berley*, 5 B. & Ald. 703; *Doe d. Shaw v. Roe*, 13 Pri. 260.

BURLEIGH *against* KINGDOM.

1834.

AT a trial before a sheriff, pursuant to a writ of trial under 3 & 4 Will. 4. c. 42. s. 18. the jury gave a verdict for 20*l.* and 10*s.* interest. Judgment was signed and the whole sum levied; a motion being made to set aside the verdict, on the ground that the demand sought to be recovered in the action appeared to exceed 20*l.*, a rule was granted conditionally, if plaintiff should not refund the 10*s.* Cause was shown, that by s. 28. of the statute the jury might allow interest. But, *per Curiam*, unless the plaintiff remits the 10*s.* he might be under considerable difficulty should the defendant bring a writ of error (a). Rule discharged, without costs, on the plaintiff's undertaking to remit the 10*s.* *Petersdorff* supported the rule, *Butt* showed cause against it.

Semble, that if on a writ of trial issued pursuant to 3 & 4 Will. 4. c. 42. s. 17. a verdict was given for 20*l.* and for a sum of 10*s.* for interest, a judgment entered up for both sums would be irregular.

(a) See *Chevely v. Morris*, 2 Bla. R. 1300; *Usher v. Dansey*, 4 M. & S. 94.

CHILTON *against* ELLIS.

CHILTON moved for an attachment for not paying money pursuant to an award made under an order of reference at nisi prius, and for non-payment of the costs, pursuant to the master's allocatur; but stated that the demand of the costs was made before the order of reference had been made a rule of court.

BAYLEY B. (the only judge in court.)—That is not sufficient. To bring a party into contempt he must be shown to have disobeyed a rule of court (b). The demand therefore must be made after the order of reference has been made a rule of court (c).

An attachment will not be granted for non-payment of money pursuant to an award, and of costs taxed thereon, till after the order of reference has been made a rule of court.

Rule refused.

(b) See *Ryalls v. Emerson*, *ante*, 367.

(c) See 2 Stra. 1173; 3 B. Moore, 64; 1 Clitt. R. 743 (b).

1884.

PRIMROSE *against* BADDELEY.

A prisoner must move to set aside proceedings for irregularity in a reasonable time, though the plaintiff has taken no step since the arrest.

BUSBY moved to set aside the copy of a writ of *capias* for irregularity, and to discharge the defendant out of custody of the sheriff of Kent. The writ was executed on 4 December. He contended that as no subsequent step had been taken by the plaintiff, the defendant being a prisoner was in time.

BAYLEY B.—If the plaintiff had thought fit to have proceeded, the defendant must have put in bail in vacation before a judge at chambers, under 11 Geo. 4. and 1 Will. 4. c. 70. s. 12, upon peril of costs. He lets the vacation elapse without putting in bail, and though no *further* step has been taken by the plaintiff, and the defendant is a prisoner, he must apply in a reasonable time, unless he can account for the delay by any special facts.

ALIVON and Another *against* FURNIVAL.

Where in an action by a foreigner, security has been given for costs, in an amount afterwards much exceeded by the defendant's costs actually incurred on the trial, it is too late for him to move for further security for costs after a nonsuit and pending a rule for a new trial.

THE plaintiffs were foreigners residing in France, who sued on a French judgment, and had given security for costs to the amount of 150*l*. At the trial they were nonsuited, but leave being given to move to enter a verdict for them, a rule was obtained accordingly, and in the alternative for a new trial^(a); pending which

Follett obtained a rule for referring it to the master to direct further security to be given, and for staying proceedings till it was given. The affidavit in support of the motion stated, that the defendant had already incurred 500*l*. costs.

(a) See the result, *post*, 751.

Bompas Serjt. and *Manning* showed cause. An application of this kind should be made at the earliest opportunity; but it is, at all events, too late, being made after issue joined; *Anon.* 5 Pri. 610. *Reg. Gen. Hil. 2 Will. 4.* No. 98, [*ante*, Vol. II. 350.] provides, that "an application to compel the plaintiff to give security for costs, must in ordinary cases be made before issue joined." The principle of that rule applies here, for the plaintiffs have gone on to incur further costs of examining witnesses in *France*, and other expensive matters, on the supposition that they had given every security for costs which could be demanded.

1854.

ALIVON
and Another
v.
FURNIVAL.

Follett supported the rule. It would be peculiarly hard on the defendant and his attorney, if the general rule, that security for costs must be moved for before issue joined, should prevail in this case. The courts, in requiring security for costs from a plaintiff who lives out of their jurisdiction, exercise a discretion merely equitable. Their object is to put both parties on an equal footing as to obtaining costs, if successful. Thus it is equally desirable to protect an *English* defendant, where the security of a foreign plaintiff, which may be sufficient at first, afterwards turns out unequal to secure the costs incurred.

Per Curiam.—The application is quite unprecedented at this stage of the cause.

Rule discharged with costs.

1834.

SLATTER *against* SCOTT.

Proceedings taken on the bail-bond were stayed, on the terms that it should stand as a security. Subsequently the principal and his bail became severally bankrupt, and obtained their certificates. On motion to have the bail-bond delivered up to be cancelled, and to enter an *exoneretur* on the bail-piece, Held, that as the bankruptcy and certificates of the bail were not disputed, the court would relieve them under the powers of 4 & 5 Ann, c. 16. s. 20. by staying proceedings on the bail-bond, though they would not order it to be delivered up, as the plaintiff was entitled to keep it in order to claim to prove in respect of it under the fiats; and the court moulded the rule accordingly, without calling on the bail to pay costs.

BAILE above not having been put in in time, proceedings were taken on the bail-bond, which were stayed at the instance of the bail on 7 December 1832, on the terms that the bail-bond should stand as a security. In January 1833 the defendant and his bail became bankrupts, and at the summer assizes of that year a verdict was obtained against the former, with leave to have immediate execution. The certificates of the bail were obtained in July 1833; that of the defendant, the principal, on 31 August 1833.

Humfrey obtained a rule to show cause why the bail-bond should not be delivered up to be cancelled, and why an *exoneretur* should not be entered on the bail-piece, on the ground of the bankruptcy of the principal and bail.

Wightman showed cause. The Court will not stay proceedings against the bail on the ground of their principal's bankruptcy; for the bail-bond was ordered to stand as a security before that event took place. Nor will their own bankruptcy be a ground for staying proceedings in this action, more than in any other; for the plaintiff has an independent cause of action against them on the bail-bond. But in no case should it be delivered up to be cancelled, for the plaintiff has a right to its custody in order to prove it under the commission.

BAYLEY B.—The bail cannot be relieved on the

1834.


 SLATTER
 v.
 SCOTT.

ground of the bankruptcy of their principal, that having taken place subsequently to the bail-bond being ordered to stand as a security. But their own bankruptcy and certificate, though they might be pleaded to the action on the bail-bond, afford also a reasonable ground for relieving them in a summary way, under the power given by 4 Ann. c. 16. s. 20.; for the bankruptcy is not questioned, and the principal is protected by his certificate. Now the court is to deal with the bail-bond, by declaring on which reference is made to the original time of its forfeiture. The bankruptcy of the bail, though subsequent to that forfeiture, does not put an end to it, but merely suspends the period when it shall be enforced (a). The plaintiff's cause of action on the bail-bond is not such that it might not be proved, or a claim made to prove in respect of it at a subsequent time, if it became necessary. The courts are in the habit of thus relieving bail, where, as in this case, the bankruptcy is not disputed; the certificate being conclusive evidence of the trading, act of bankruptcy, and petitioning creditor's debt (b). The terms of the rule may be moulded to grant such relief as we think right, under the statute of Anne; and will be, that the proceedings on the bail-bond be stayed.

On *Wightman's* pressing for costs, stating that he had been obliged to appear in opposition to that part of the rule which prayed the bond to be delivered up, the court refused them, saying, that the plaintiff, when served with the rule, should have informed the bail that he would agree to a stay of proceedings, but not to the other terms of the rule.

Rule absolute to stay proceedings on the bail bond (c).

(a) See 6 G. 4. c. 16. s. 52.

(b) 6 G. 4. c. 16. s. 126. 5 G. 2. c. 30. s. 7. 13.

(c) See *Bottomley v. Medhurst and Another*, Maclelland's Rep. 399. In *Slapleton v. Macher*, 7 Taunt. 591, Gibbs C. J. says, "The rule is, that bail

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v.
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fixed by a regular judgment shall not be relieved in case of the bankruptcy of their principal, unless at the time when they were fixed, the bankrupt was in such a situation that he could not be sued." There, at the time they were fixed, the principal's certificate had not been allowed by the chancellor. See *Johnson v. Lindsay*, 1 B. & C. 287; *Wentley et al. v. Colles et al.* 1 Barr. 244; *Mannin v. Partridge*, 14 East, 509.

ROUNCILL against BOWER.

In order to satisfy the court under 2 & 3 Will. 4. c. 39. s. 3. that proper means have been taken to serve a distringas on a defendant, who was a clerk in the victualling office, in order to enter an appearance against him, it should be shown not only that his residence or property could not be discovered, but that attempts had been made to serve him at the victualling office.

BERE moved to enter an appearance for the defendant under 2 & 3 Will. 4. c. 39. s. 3. In order to satisfy the court "that due and proper means had been taken to serve and execute the distringas," he produced an affidavit that the defendant was a clerk in the victualling office, but that the plaintiff had been unable to discover his place of residence, or any property belonging to him, on which to distrain, and that due diligence had been used to execute the distringas, but without success. But, *per Curiam*, It does not appear that inquiries were made at the victualling office, in office hours, when the defendant would probably have been to be found there, or that proper attempts have been made to serve the writ on him there.—Rule refused.

but that attempts had been made to serve him at the victualling office.

DICKENSON against REYNOLDS.

The declaration was delivered in *Michaelmas* vacation, as of *Michaelmas* term; and the plea entitled on 11th *January*, was delivered as of that day, (being the first day of *Hilary* term). The issue was made up and delivered as of *Michaelmas* term. The court refused a motion to set it aside, for not being made up of *Hilary* term; as the plea might have been delivered before the sitting of the court on 11 *January*, and no damages appeared from the issue being entered of *Michaelmas* term.

THE declaration was delivered on 2d *December* as of *Michaelmas* term. The plea was delivered on

11th *January*, entitled on that day. The issue, however, was made up as of *Michaelmas* term, instead of this term. *Chilton* moved to set aside the delivery of the issue, contending, that when the issue is of the same term with the declaration, it ought to begin with the term in which or in the vacation of which the declaration was delivered, and then to proceed with a transcript or copy of the declaration and subsequent proceedings in the present tense; but that if the issue is made up of a subsequent term, then after mentioning the term in or of which the issue is joined, it should state in the past tense that the plaintiff, on the day on which the declaration was delivered, complained &c., setting out the declaration and subsequent pleadings.

1834.

DICKENSON
v.
REYNOLDS.

BAYLEY B.—The plea is not entitled of the first day of *Hilary* term, but on the 11th *January*. That shows the issue to be properly made up as of *Michaelmas* term. For all that appears, the plea might have been delivered on the 11th *January* before the Court actually sat, and the term began; *Pugh v. Robinson* (a). Besides, as you do not show yourself prejudiced, we ought not to interfere to set aside the proceedings. The other barons concurred.

Rule refused.

(a) 1 T. B. 116. See 1 Br. & B. 379; 10 B. M. 194; Macd. & Young, 202; 6 B. & Cr. 127; 2 D. & B. 368.

END OF HILARY TERM.

1834.
*Hilary Vacation 1834.**Directions to Taxing Officers as to all Writs issued
on or after the 15th March 1834.*

IN all actions of assumpsit, debt, or covenant, where the sum recovered or paid into court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed twenty pounds (without costs), the plaintiff's costs shall be taxed according to the reduced scale hereunto annexed.

Provided, that in case of trial before a judge in one of the superior courts, or judge of assize, if the judge shall certify on the postea that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale.

At the head of every bill of costs taken to the taxing officer to be taxed, it shall be stated whether the sum recovered, accepted, or agreed to be paid, exceeds the sum of twenty pounds or not, in the following form :—

Debt above 20*l*.

Debt 20*l*. or under.

Three shillings and fourpence shall be allowed for drawing the judgments in all cases.

The officers of the court of Exchequer are to allow no incipiturs of judgment upon paper, and are to mark the costs upon the postea.

Every brief sheet is to contain eight folios at the least, which are to be paid for at the rate of six shillings and eightpence per sheet for drawing, and three shillings and fourpence for copying ; such parts of the briefs only as are really drawn to be allowed as drawing, the rest to be allowed as copying.

The allowance to witnesses for travelling is to be

only the sum actually paid, and that not exceeding one shilling per mile, except under special circumstances.

.1834.

No fee to counsel is to be allowed on writs of trial, except trials before the judge of the sheriff's court of *London*, or of other courts of record, where attorneys are not allowed to practise, and then one guinea only.

The fees to be allowed to counsel's clerks are not to exceed as under.

	£	s.	d.
Upon a fee under ten guineas	-	-	0 2 6
Ten guineas and under twenty guineas	-	-	0 5 0
Twenty guineas and upwards	-	-	0 10 0
Senior counsel's clerk on consultation	-	-	0 7 6
The other counsel's clerks on ditto, each	-	-	0 2 6
Attending as a witness at trials to prove documents	-	0	10 6

SCHEDULE I.

Commencement of Suit.

Letter before action, if sent	-	-	-	0 2 0
Instructions to sue	-	-	-	0 3 4
Writ	-	-	-	0 10 0
Copy and service	-	-	-	0 5 0
Bill and copy to indorse	-	-	-	0 2 0
Searching for appearance	-	-	-	0 3 4
Instructions for declaration	-	-	-	0 3 4
Drawing same at one shilling per folio	-	-	-	
Ingrossing at fourpence	-	-	-	
Notice thereof when filed	-	-	-	0 5 0
Drawing particulars and copy	-	-	-	0 2 6
Rule to plead	-	-	-	0 1 0
Demanding plea	-	-	-	0 3 0
Drawing issue of whatever length	-	-	-	0 3 4
Ingrossing issue to deliver at fourpence per folio	-	-	-	
Notice of trial	-	-	-	0 2 0

SCHEDULE II.

Where the Cause is tried before the Sheriff.

Summons for trial	-	-	-	0 1 0
Copy and service	-	-	-	0 3 0
Attending for order	-	-	-	0 3 4
Paid order	-	-	-	0 1 0

1834.

	£	s.	d.
Copy and service - - - - -	0	3	0
Ingrossing writ of trial folio (14) - - - - -	0	4	8
Parchment - - - - -	0	3	0
Paid sealing - - - - -	0	0	7
Attending thereon - - - - -	0	3	4
Copy particulars to annex - - - - -	0	2	0
Subpoena - - - - -	0	5	0
Copy and service - - - - -	0	3	0
Making minutes of evidence for the hearing - - - - -	0	13	4
Attending to enter the cause - - - - -	0	3	4
Paid in part of the sheriff's fee on leaving the same - - - - -	0	4	0
(No more to be paid if withdrawn.)			
Attending court on trial - - - - -	0	13	4
Paid remainder of fee for trial - - - - -	1	4	6
Notice of taxing - - - - -	0	3	0
Affidavit of increase - - - - -	0	5	0
Paid filing affidavit (whether town or country) - - - - -	0	1	0
Bill of costs and copies - - - - -	0	4	0
Attending taxing - - - - -	0	3	4
Paid taxing (in K. B. and Exchequer) - - - - -	0	2	6
Drawing judgment - - - - -	0	3	4
Entering on roll at fourpence per folio - - - - -			
Paid roll at tenpence - - - - -			
Paid entries (as usual) - - - - -			
Paid judgment fee and docket (as usual) - - - - -			
Attending thereon - - - - -	0	3	4
Term fee &c. - - - - -	0	10	0
Letters in country causes.			
Under 50 miles - - - - -	0	2	0
Above 50 miles - - - - -	0	4	0
Above 100 miles - - - - -	0	6	0
When fi. fa. and warrant thereon.			
In town - - - - -	0	8	0
In country - - - - -	0	13	0

SCHEDULE III.

Where cause is tried at Nisi Prius.

Verdict for 20l. or under.

Ingrossing record, folio 14 - - - - -	0	4	8
Parchment - - - - -	0	3	0
Paid sealing - - - - -	0	0	7
Attending thereon - - - - -	0	3	4

HILARY VACATION, FOURTH WILLIAM IV.

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1834.

	£	s.	d.
Copy particulars to annex - - - - -	0	2	0
Venire - - - - -	0	6	6
Paid return - - - - -	0	2	0
Attending thereon - - - - -	0	3	4
Distringas - - - - -	0	7	6
Paid return - - - - -			
Attending thereon - - - - -	0	3	4
Subpoena - - - - -	0	5	0
Copy and service - - - - -	0	3	0
Instructions for brief - - - - -	0	13	4
Brief and copy (no more) - - - - -	2	0	0
Attending to enter cause - - - - -	0	3	4
Paid entering (what has been paid) - - - - -			
Paid counsel (as usual) - - - - -			
Attending court on trial - - - - -	1	1	0
Paid fees on trial (what has been paid) - - - - -			
Postea - - - - -	0	5	0
Notice of taxing - - - - -	0	3	0
Affidavit of increase - - - - -	0	5	0
Paid filing same - - - - -	0	1	0
Bill of costs and copies - - - - -	0	4	0
Attending taxing - - - - -	0	3	4
Paid taxing (as usual) - - - - -			
Drawing judgment - - - - -	0	3	4
Entering on the roll at fourpence - - - - -			
Paid roll at tenpence - - - - -			
Paid judgment, fee and docket - - - - -			
Attending thereon - - - - -	0	3	4
Term fee - - - - -	0	10	0
Letters in country cause,			
Under 50 miles - - - - -	0	8	0
Above 50 miles - - - - -	0	4	0
Above 100 miles - - - - -	0	6	0

Where the writ is issued on or after the 15th March 1834.

REPORTS OF CASES
ARGUED AND DETERMINED IN THE
COURTS OF EXCHEQUER OF PLEAS
AND
EXCHEQUER CHAMBER,
IN
Easter Term,
IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

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For the important *RÈGULÈ GENERALES* promulgated in *Hilary* term 1834, and taking effect the first day of *Easter* term 1834, see Part I. of this Volume: they are intended to be subjoined to it when completed.

MEMORANDA.

In *Trinity* vacation 1833, *John Balguy* of the *Middle Temple* esq., was appointed one of his Majesty's counsel, and took his seat within the bar on the first day of *Michaelmas* term 1833.

In the vacation after *Hilary* term 1834, Mr. Baron *Bayley* retired from his office of a baron of the Exchequer, and was on that occasion created a Baronet of the United Kingdom (a). He was succeeded on the 28th *February* by *John Williams* esq., K. C. who had been previously called to the degree of Serjeant-at-law,

(a) See *ante*, Vol. I. 167.

and had given rings with the motto "Tutela legum." Mr. Baron *Williams* was afterwards knighted.

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About the same time, Sir *William Horne* resigned the office of his Majesty's *Attorney-General*, and was succeeded by Sir *John Campbell*, his Majesty's *Solicitor-General*. *Charles Christopher Pepys* esq. K. C., succeeded Sir *John Campbell* in the latter office, and was knighted.

In the same vacation Mr. Serjeant *Jones* received his Majesty's licence to assume and bear the surname of *Atcherley*, in pursuance of the will of his late maternal uncle.

In the same vacation his Majesty was pleased by his letters-patent to grant the dignity of a Baron of the united kingdom of *Great Britain and Ireland* to the Right Honorable Sir *Thomas Denman* Knight, Chief Justice of the court of King's Bench, and the heirs male of his body lawfully begotten, by the name, style and title of Baron *Denman*, of *Dovedale* in the county of *Derby*.

Early in *Easter* term, Mr. Justice *Parke*, Mr. Justice *Alderson*, Mr. Baron *Vaughan*, and Mr. Baron *Williams*, resigned their seats in their respective courts. Mr. Baron *Williams* was appointed a judge of the court of King's Bench in the room of Mr. Justice *James Parke*, and Mr. Justice *James Parke* and Mr. Justice *Alderson*, Barons of the court of Exchequer, *vice* Barons *Vaughan* and *Williams*. Mr. Baron *Vaughan* succeeded Mr. Justice *Alderson* as a judge of the court of Common Pleas, and was on that occasion appointed a Member of his Majesty's Most Honorable Privy Council. The above judges took their seats accordingly in their respective courts on 29th *April* 1834.

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On *Friday* the 25th of *April*, in this term, the following warrant was read by the officer of the Court, and ordered to be entered of record :—

WILLIAM, R.

WHEREAS it hath been represented to us that it would tend to the general dispatch of the business now pending in our several Courts of common law at *Westminster*, if the right of counsel to practise, plead, and be heard, extended equally to all the said Courts; but such objects cannot be effected as long as the Serjeants at law have the exclusive privilege of practising, pleading, and audience, during term time, in our Court of Common Pleas at *Westminster*: We do therefore hereby order and direct that the right of practising, pleading, and audience, in our said Court of Common Pleas during term time, shall, upon and from the first day of *Trinity* term now next ensuing, cease to be exercised exclusively by the Serjeants at law; and that, upon and from that day, our counsel learned in the law, and all other barristers at law, shall and may, according to their respective rank and seniority, have and exercise equal right and privilege of practising, pleading, and audience in the said Court of Common Pleas at *Westminster*, with the Serjeants at law: And we do hereby will and require you to signify to Sir *Nicolas Conyngham Tindal*, knight, our Chief Justice, and his companions, Justices of our said Court of Common Pleas, this our royal will and pleasure, requiring them to make proper rules and orders of the said Court, and to do whatever may be necessary to carry this our purpose into effect. And whereas we are graciously pleased, as a mark of our royal favour, to confer upon the Serjeants at law

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hereinafter named, being Serjeants at this present time in actual practice in our said Court of Common Pleas, some permanent rank and place in all our Courts of law and equity ; we do hereby further order and direct that *Vitruvius Lawes, Thomas D'Oyley, Thomas Peake, William St. Julian Arabin, John Adams, Thomas Andrews, Henry Storks, Ebenezer Ludlow, John Scriven, Henry John Stephen, Charles Carpenter Bompas, Edward Goulburn, George Heath, John Taylor Coleridge, and Thomas Noon Talfourd*, Serjeants at law, shall from henceforth, according to their respective seniority amongst themselves, have rank, place, and audience, in all our Courts of law and equity, next after *John Balguy, Esq.*, one of our counsel learned in the law : And we do hereby will and require you not only to cause this our direction to be observed in our Court of Chancery, but also to signify to the Judges of our several other Courts at *Westminster*, that it is our express pleasure that the same course be observed in all our said Courts. Given at our Court of *St. James's*, this 24th day of *April*, in the fourth year of our reign.

"To the Right Hon. *Henry Lord Brougham*
and *Vaux*, Lord High Chancellor of Great
Britain."

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ELIZABETH SHERIFF RUSSEL against ROBERTSON BUCHANAN, NATHANIEL NICHOLLS, and FRANCES RUSSEL, spinster, MARY RUSSEL, spinster, ELIZABETH RUSSEL, spinster, ELLEN RUSSEL, spinster, and JANE RUSSEL, spinster, infants under the age of twenty-one years, by ANDREW BUCHANAN, their guardian.

R. B. devised freehold premises to his wife during her life or widowhood, and after her death or marriage, to his nephew

R. B. R. for life, and from and after his decease "unto and equally between all and every the children of his said nephew

R. B. R. law-

fully begotten, their heirs and assigns respectively, as tenants in common," if more than one, and if but one, then to such only child, his heirs and assigns; but in case there should be no child or children of his said nephew R. B. R. living at the time of the decease or marrying again of his the testator's said wife, then he devised over to his executors in trust for other persons. The residue was devised to certain other persons. By codicil dated and executed on the same day as the will, duly attested so as to pass real estates, the testator directed "*That neither the said R. B. R., nor any or either of his issue, shall by virtue of this my will, take or be considered as entitled to a vested interest or interests, unless and until they shall respectively attain the age of 21 years.*" R. B. R. the nephew attained 21, married, had children in the lifetime of the testator's widow, and survived her, as did his children. At her death he entered into possession of the devised estate, and afterwards died, leaving five children surviving him, all infants; and having by will devised all freehold estates of which he might die seised, and over which he might have a disposing power, to certain persons, upon trusts mentioned in the will:—Held, that the devises substituted by the will for those previously made to the children became void, the events contemplated not having happened; and that the estates devised to the children by the will being rendered contingent by the codicil, failed of effect for want of a particular estate of freehold to support them at the death of R. B. R.; so that the fee passed by the will of the testator's heir at law.

BY order of the Vice-Chancellor the following case was sent for the opinion of this court:—

Robert Brown, late of *Streatham* in the county of *Surrey* esq., deceased, was at his death possessed of a very large personal estate, and was also in his lifetime, and at the time of making his will hereinafter mentioned, and from thenceforth, and at the time of his death, seised in fee simple in possession of and in divers hereditaments and premises, and amongst others of and in a certain mansion-house, and certain messuages, lands, and hereditaments, situate at *Streatham* aforesaid,

and hereinafter mentioned ; and being so seised, the said *Robert Brown* did, when he was of sound and disposing mind, memory, and understanding, and on the 12th day of *March* 1814, duly make and publish his last will and testament in writing of that date, and which was executed by him, and attested so as to pass freehold estates of inheritance, whereby, after certain bequests, he gave and devised to his wife *Susanna Brown*, all that his capital mansion-house, with the lands, tenements, and hereditaments thereunto belonging, and wherein he then resided, situate at *Streatham* in the county of *Surrey*, which he had purchased of Lord *William Russel*, together with all the new buildings and additions made thereto, and all other his messuages, lands, tenements, and hereditaments whatsoever, at *Streatham* aforesaid, to hold the same unto his said wife and her assigns for and during the term of her natural life ; provided always, that in case his said wife should at any time after his decease marry again, then the said testator did thereby absolutely revoke, annul, and make void all and every the devises and bequests in his said will contained in her favour, and instead and in lieu thereof he gave and bequeathed to the executors of his said will, and the survivor of them, his executors and administrators, for and during the term of the natural life of his said wife, the annuity in the said will mentioned ; and from and immediately after the decease or marrying again of his said wife, the said testator gave and devised to his nephew *Robert Brown Russel*, all those his said capital and other messuages, lands, tenements, hereditaments, and premises thereinbefore mentioned, situate and being at *Streatham* aforesaid, with their appurtenances, to hold to his said nephew *Robert Brown Russel* and his assigns, for and during the term of his natural life ; and from and after the decease of his said nephew *R. B. Russel*, the said

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testator gave and devised the said capital and other messuages, lands, tenements, hereditaments, and premises at *Streatham* aforesaid, with their appurtenances, "unto and equally between all and every the children of his said nephew *R. B. Russel* lawfully begotten, their heirs and assigns respectively, as tenants in common and not as joint tenants, if more than one, and if there should be but one child, then the whole to such only child, his or her heirs and assigns;" but in case there should be no child or children of his said nephew *R. B. Russel* living at the time of the decease or marrying again of his the testator's said wife, then he gave and devised the said capital and other messuages, lands, tenements, hereditaments, and premises at *Streatham* aforesaid, unto his said executors, and the survivor of them, his executors and administrators, in trust and for the sole and separate use and benefit of his the testator's niece *Mary Russel*, exclusive and independent of the control, debts, or engagements of any husband or husbands she might happen to marry; and from and after the decease of his said niece *Mary Russel*, in trust for all and every her child and children lawfully to be begotten, if more than one, their respective heirs and assigns, as tenants in common and not as joint tenants, and if but one child, then in trust for such only child, his or her heirs or assigns; and in case of the respective deceases of the said *Robert B. Russel* and *Mary Russel*, without leaving any child or children who should be living at the decease or marrying again of his the said testator's said wife, then he gave and devised his said capital and other messuages, lands, tenements, hereditaments, and premises, with the appurtenances at *Streatham* aforesaid, unto and equally between *Robert Coster*, *John Coster*, and *Mary Ann Squarrey*, the children of *Robert Coster* and *Hannah Coster*, their heirs and assigns respectively, as tenants

in common and not as joint tenants. And the said *Robert Brown*, by his said will, gave and bequeathed the rest, residue, and remainder of his estate and effects whatsoever and wheresoever, and of what nature or kind soever, from and after the decease or marrying again of his said wife the said *Susanna Brown*, which should first happen, unto and between his said nephew *Robert Brown Russel*, and his said niece *Mary Russel*, spinster, in equal shares and proportions, share and shares alike, with divers bequests over of such residuary estate and effects, upon certain events which did not happen, for the benefit of the children of the said *Robert Brown Russel*, and *Mary Russel*, spinster, and of the said *Robert Coster*, *John Coster*, and *Mary Ann Squarrey*.

The said *Robert Brown* afterwards, on the same 12th day of *March* 1814, and when he was of sound and disposing mind, memory, and understanding, duly made and published a codicil or instrument in writing of that date to his said last will and testament, and which was executed by him, and attested so as to pass freehold estates of inheritance, and which codicil or instrument in writing is in the words and figures following, that is to say, "This is a codicil to my foregoing will. It is my will and mind, and I do hereby direct that neither the said *Robert Brown Russel* nor *Mary Russel*, nor any or either of their issue respectively, nor the said *Robert Coster*, *John Coster*, or *Mary Ann Squarrey*, nor any or either of their issue respectively, shall, by virtue of this my will, take or be considered as entitled to a vested interest or interests, unless and until they shall respectively attain the age of twenty-one years; and in case of the death of any one or more of such children under such age, then the share of such child or children so dying shall go to the surviving brothers and sisters, or brother or sister, as

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the case may be, of such child or children so dying, their, his, or her heirs and assigns respectively, upon their respectively attaining the age of twenty-one years." Which said will and codicil are to be considered as part of this case, and reference to any part of which not hereinbefore set out may be made upon the argument by the counsel for any of the parties.

The said *Robert Brown*, shortly after the date and execution of his said will and codicil, and in the said month of *March* 1814, departed this life, without having in any manner revoked or altered his said will or codicil, save as the said will may be revoked by the said codicil, and without having in any manner revoked or altered the said codicil, leaving the said *Susannah Brown* his widow, and *Robert William Brown* his only son and heir-at-law, and the said *Robert Brown Russel* and *Mary Russel*, spinster, respectively him surviving. The said testator *Robert Brown* was not, at the respective times of making his said will and of his death, seised of any lands, hereditaments, or premises, other than and except the said mansion-house, lands, hereditaments, and premises at *Streatham* aforesaid, and certain other hereditaments by his said will specifically disposed of in manner therein mentioned. The said *Susanna Brown* his widow never, after the death of the said testator *Robert Brown*, intermarried again or became the wife of any other person; and the said *Susanna Brown*, widow, upon the death of the said testator *Robert Brown*, under and by virtue of the said will, entered into the possession of the said mansion-house, lands, hereditaments, and premises at *Streatham* aforesaid, and into the perception and receipt of the rents and profits thereof respectively, and she continued in such possession and in such perception and receipt down to the period of her death, which took place in the month of *September* 1829.

The said *Robert William Brown*, the said testator *Robert Brown's* heir-at-law, departed this life in the lifetime of his mother, the said *Susanna Brown*, widow, without issue and intestate, and without having done or joined in doing any act in law whatsoever for the purpose of conveying or assuring away, or for the purpose of charging or incumbering any right, title, or interest of or to the said capital mansion-house, lands, hereditaments and premises at *Streatham* aforesaid, or of or to the rents and profits thereof respectively; and the said *Robert William Brown* left the said *Robert Brown Russel*, his cousin and heir-at-law, him surviving, and who, upon the death of the said *Robert William Brown*, became the heir-at-law of the said testator *Robert Brown*.

The said *Robert Brown Russel*, after the death of the said testator *Robert Brown*, and during the lifetime of the said *Susannah Brown*, widow, intermarried with the plaintiff, then *Elizabeth Sheriff Buchanan*, spinster, and there are issue of such marriage five children and no more, namely, the defendants, *Frances Russel*, spinster, *Mary Russel*, spinster, *Elizabeth Russel*, spinster, *Ellen Russel*, spinster, and *Jane Russel*, spinster, who are all infants under the age of twenty-one years, and who were all born during the lifetime of the said *Susannah Brown*, widow; and the said *Frances Russel* is the eldest of such five children, and is of the age of thirteen years or thereabouts, and the said *Robert Brown Russel* never had any other child or children except the said defendants, his five daughters, as hereinafter mentioned.

Upon the death of the said *Susanna Brown*, widow, the said *Robert Brown Russel*, who, during the lifetime of the said *Susanna Brown*, widow, had attained his age of twenty-one years, under and by virtue of the said will and codicil of the said testator *Robert Brown*,

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and being such heir-at-law, entered into the possession of the said capital mansion-house, lands, tenements, hereditaments, and premises at *Streatham* aforesaid, and into the perception and receipt of the rents and profits thereof; and he continued in such possession, and in such perception and receipt, down to the time of his death hereinafter mentioned.

The said *Robert Brown Russel*, during the time he was in such possession and in such perception and receipt as aforesaid, and when he was of sound and disposing mind, memory, and understanding, and on the 13th day of *April* 1832, duly made and published his last will and testament in writing of that date, and which will was executed by him and attested so as to pass freehold estates of inheritance; and he thereby, after bequeathing certain pecuniary and specific legacies, gave, devised, and bequeathed all his freehold and copyhold estates of which he might die seised or possessed, and of or over which he might have a disposing power, and all the rest, residue, and remainder of his personal estate of which he might die possessed, of whatever nature, and wheresoever situate at the time of his decease, and over which he should then have a disposing power, to his wife the plaintiff, *Elizabeth Sheriff Russel*, late *Elizabeth Sheriff Buchanan*, spinster, the defendants *Robertson Buchanan* esq., and *Nathaniel Nicholls*, merchant, and whom he by his said will appointed the executrix and executors thereof, and to the survivors and survivor of them, her or his heirs, executors, and administrators, upon certain trusts in the said will mentioned, as by such will, reference being thereunto had, will appear. Which said will is also to be taken as part of this case, and reference to any part thereof, not herein set out, may be made upon the argument by the counsel for any of the parties.

The said *Robert Brown Russel* departed this life on

the 26th day of *April* 1832, without having revoked or in any way altered his said will, leaving the said plaintiff *Elizabeth Sheriff Russel*, his widow, the said defendants *Robertson Buchanan*, *Nathaniel Nichols*, and the said defendants, his said hereinbefore mentioned five infant daughters, his only children and co-heiresses at law respectively, him surviving; and the said defendants *Frances Russel*, spinster, *Mary Russel*, spinster, *Elizabeth Russel*, spinster, *Ellen Russel*, spinster, and *Jane Russel*, spinster, are the co-heiresses at law of the said *Robert William Brown*, and of the said testator *Robert Brown*. The said *Elizabeth Sheriff Russel*, widow, *Robertson Buchanan*, and *Nathaniel Nicholls* have, since the death of the said *Robert Brown Russel*, duly proved his said will in the proper Ecclesiastical court, and they thereby became and are now his legal personal representatives. The said *Elizabeth Sheriff Russel*, widow, on the 6th day of *November* 1832, exhibited her bill of complaint in his Majesty's high court of Chancery at *Westminster*, against the said *Robertson Buchanan* and *Nathaniel Nicholls*, and against the said *Frances Russel*, spinster, *Mary Russel*, spinster, *Elizabeth Russel*, spinster, *Ellen Russel*, spinster, and *Jane Russel*, spinster, stating and praying to the effect therein mentioned. And the said several defendants having respectively appeared to and put in their respective answers to the said bill, the said cause came on to be heard before his honor the Vice-Chancellor at *Westminster*, on the 29th day of *January* 1833, when his honor, amongst other things, was pleased to direct a case to be made for the opinion of this honourable court upon the following questions, viz.

First, whether the said *Robert Brown Russel* took any and what interest in the said capital mansion-house, lands, tenements, hereditaments, and premises at *Streat-ham* aforesaid, or in the rents and profits thereof,

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under and by virtue of the said will and codicil of the testator *Robert Brown*, or as the heir-at-law of the said *Robert William Brown*, or as the heir-at-law of the said testator *Robert Brown*.

Secondly, whether the said defendants *Frances Russel*, spinster, *Mary Russel*, spinster, *Elizabeth Russel*, spinster, *Ellen Russel*, spinster, and *Jane Russel*, spinster, the infants, now take any and what interest in the said capital mansion-house and lands, hereditaments and premises at *Streatham* aforesaid, or in the rents and profits thereof, under and by virtue of the said will and codicil of the said testator *Robert Brown*, or as the heiresses-at-law of the said *Robert William Brown*, or *Robert Brown Russel*.

Thirdly, whether the said *Elizabeth Sheriff Russel*, widow, *Robertson Buchanan*, and *Nathaniel Nicholls*, now take any and what interest in the said capital mansion-house, lands, hereditaments, and premises at *Streatham* aforesaid, or in the rents and profits thereof, under and by virtue of the said will of the said *Robert Brown Russel*.

Preston for the heir at law. First, the will of *Robert Brown*, taken *per se*, obviously vested in the children of *Robert Brown Russel* an estate in fee as tenants in common at the death of their father, the tenant for life. Secondly, none of the ulterior events designated by the will as competent to defeat those estates ever occurred; for the children of *Robert Brown Russel* were living at the death of *Robert Brown's* widow. Thirdly, the residuary clause has no operation; for though such a clause may have an operation to pass whatever is not before effectually given by the will, yet, where precedent words in the will have disposed of the whole property effectually, nothing remains on which it can ope-

rate. The time from which the will speaks and takes effect is from the testator's death, though his intent is to be taken as things stood at the time of making it. Here the event of the birth of *Robert Brown Russel's* children, which, according to the will, occasions the failure of the ultimate devises, happened subsequently to the testator's death. *Doe d. Morris v. Underdown(a)* is a ruling case to show that a residuary claim has no effect, where the will previously disposed of the whole property. There the testator devised lands to *A.* till *B.*, *C.*, and *D.* attained their respective ages of twenty-one, and then to *B.*, *C.*, and *D.* and their heirs, equally to be divided between them as tenants in common, charged with the payment of an annuity of 10*l.* by *B.*, *C.*, and *D.* equally and proportionably out of their several estates, and devised other lands to *A.* in fee, and then gave *all* the rest, residue and remainder of his real and personal estate, *not before given*, to *E.*, her heirs, executors &c., and directed that his debts, &c. should be paid out of the estate given to *A.* and *E.* *B.* died before the devisor, but if he had lived would have attained twenty-one at the time of the trespass and ejectment. It was held, that the devise to *B.* was a lapsed devise, and that *B.*'s share not being disposed of by the will went to the heir at law of the devisor, not to *E.* his residuary devisee; *Willes C. J.* laying it down (p. 297) that when a testator in his will had given away all his estate and interest in certain lands, so that if he were to die immediately, nothing remained undisposed of, he could not intend to give any thing in those lands to his residuary devisee. The previous cases of *Roe v. Fludd(b)* and *Wright v.*

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and Others.(a) *Willes*, 393.(b) *Fortesc. R.* 184. stated also in *Willes*, 300; and see 8 *Vin. Abr.* 295, tit. *Devise* (O b.); 6 *Cruise's Digest*, 3d edit. 145; but see as to this case, *Aselyu v. Ward*, 1 *Ves.* 420, *Willes*, 303; *Gulliver v. Wicket*, 1 *Wils.* 105, 2 *Fearne*, 393, 4th edit.

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Hall (a) are in accordance with that decision. In *Doe d. Wells v. Scott* (b) the residuary claim was only held to have operation, because an interest existed in the lands devised, which was not fully disposed of by the prior parts of the will. That brings us to consider,

Fourthly, what is the effect of the codicil? Nothing in it shows that the testator used the word "vested" with reference to the possession only; whereas, had he desired to express a contingency, he could not have used more apt. terms. By the express words of the codicil not any or either of the issue of *Robert Brown Russell* are, by virtue of the will, to take a "vested interest" unless or until they shall respectively attain the age of twenty-one years. By a "vested" interest is meant that which is directly contrary to a "contingent" interest, and those words must receive the technical construction which they bear. Every one who has an actual estate or vested interest, has seisin in law or fact (c). But as the testator conferred vested estates by his will, he must, under the wording of his codicil, be taken to have meant to render them contingent on the event of *Robert Brown*'s children respectively attaining twenty-one, by suspending the time when they would have vested by the will till those events happened, and to exclude them from enjoying the rents till then (d). If so, the children's interests were made contingent by the codicil; then,

Fifthly, by the death of their father, *Robert Brown Russell*, before they attained twenty-one, the merger or union of his particular estate for life with the fee took place, and the contingent remainders in fee to the children were defeated for want of a particular estate of freehold in trustees to support them. The

(a) Fortesc. R. 182.

(b) 3 M. & S. 300.

(c) 1 Cruise, 58.

(d) See *Glanvill v. Glanvill*, 2 Meriv. 38.

consequence is, that *Robert Brown's* devise over of the *Stratford* estate failed; and it passed by the will of *Robert Brown Russel*, his heir at law, to his widow *Elizabeth Sheriff Russel* and his two other trustees and executors, in trust for his widow for life, and to his children in fee after her death. The latter, therefore, sustain no further injury than the interposition of their mother's life interest. [Lord *Lyndhurst* C.B.] The whole question turns on this point, whether by the words of this codicil the children took a vested or contingent interest only?

Colridge Serjt. appeared for *Nathaniel Nicholls*, the trustee and executor named by the will of *Robert Brown Russel*.

J. Radcliff for the children of *Robert Brown Russel*. First, the children of *Robert Brown Russel* take vested estates in fee in possession under the will, as tenants in common; subject however to this operation of the codicil, that in case of the death of any of them under twenty-one, the share of the deceased would be devoted in favour of those who attain that age. It is, however, contended that by the codicil the shares became contingent on the event of attaining full age. But no testamentary disposition is ever construed to make an estate contingent which can be held to be vested; nor, if it can be avoided, to create an intestacy. The whole difficulty here arises on the codicil: then the Court will look at the whole scheme of the testator's disposition, in order to discover ground for supporting the will. The codicil was only intended to apply that provision for the event of any death among the children before attaining full age, which had been omitted in the will. Then did the testator, by his codicil, intend to make the vesting the shares contingent

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on the attainment of twenty-one years as a condition precedent, or merely to postpone till that age their right of possession of the shares already vested in them by the will?

It is submitted that the intent of the codicil was not to invalidate the whole previous dispositions of his will as to this property, by suspending the time when the shares were to vest, but only to postpone the time when the children were to be entitled to possession. By "vested interest" the testator meant interest vesting in possession not in interest. But Lord Alcock's observations in *Wadley v. North* (a) show, that the mention by the testator of the age at which the law would put the devisees in possession, affords a presumption that he meant merely to postpone the time when they were to have possession of the shares, and not to alter the time when they were to vest. At twenty-one the shares already vested are to become indefeasible; for how could the codicil give the shares of those who die under twenty-one to the survivors, if nothing vested in any of them before that age? Supposing the children's estates to be held not vested at their births, but only contingent on attaining twenty-one, then if *Robert Brown Russel* had survived Mrs. Brown, having at that time a child or children who afterwards died in his lifetime, but before attaining twenty-one, leaving issue, neither the latter, nor even the substituted devisees could have taken; for the event limited by the will, viz. if no child of *Robert Brown Russel* should be living at the decease of Mrs. Brown, would not have happened; *Doe v. Cook* (b), *Doe v. Rawding* (c), and *Shultham v. Smith* (d).

Again, had the testator meant the estates of *Robert Brown Russel's* children to be contingent on attaining

(a) 3 Ves. jun. 367.

(b) 7 East, 269.

(c) 2 B. & Ald. 441.

(d) 6 Dow's P. C. 22.

twenty-one, and not to be vested, he would have made some provision as to the accruing rents, and would have provided that the limitations over to *Mary Russell's* children should depend, not on the event of there being no child of *Robert Brown Russell* living at the death of *Mrs. Brown*, but on the event of no such child attaining twenty-one. Though "vested" is a technical word, yet when found in a will, it will require that technical or untechnical interpretation which will best support the testator's intention. In *Vouchamp v. Bell* (a) Sir John Leach M.R. said, "if, by giving to the words which a testator has used their literal and technical effect, inconsistent and absurd conclusions must necessarily follow, and if by understanding such words more largely, the whole will be rendered more rational and consistent, the court, which departs from the literal and technical sense of the words, does not adopt conjecture as opposed to expressed intention, but has recourse to a sound rule for collecting what is the intention which is really meant to be expressed." [Lord Lyndhurst C. B.] That applies where the intention not to use the technical word in the technical sense clearly appears (b).

In whatever manner the codicil may be construed, it must be read as one entire instrument with the will (c), particularly here where they are of the same date. By the will the children of *Robert Brown Russell* would confessedly take vested estates. Then the codicil operates in the nature of a condition subsequent, postponing the right of possession, and divesting the estates of those of them who should die under full age. And if all the estates are rendered contingent by the codicil, its words "unless and until they shall respect-

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(a) 6 Madd. (or Madd. & Geldart's Rep.) 346.

(b) See ante, Vol. III. 921, 922, *Doe v. Mayrick*.(c) *Hall v. Chapman*, 1 Ves. jun. 407.

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tively attain 'twenty-one,' mean 'when or if they attain that age (a). In *Edwards v. Hammond* (b), a copyholder surrendered to the use of himself for life, and after his decease to the use of his eldest son *John Hammond* and his heirs—“if it shall happen that the aforesaid *John Hammond* shall live until he attain the age of twenty-one years; provided always, and under the condition nevertheless, that if it shall happen that the aforesaid *J. Hammond* shall die before he attain the age of twenty-one years, then to remain to the use of the surrenderer and his heirs.” The court held, that though by the first words this might seem to be a condition precedent, yet, taking all the words together, it was not a condition precedent, but a present devise to the eldest son, subject to and defeasible by this condition subsequent, viz. his not attaining the age of twenty-one. Now though a devise in these terms would be contingent if standing alone, *Johnson v. Gabriel* (c); yet being followed by a devise over to the survivors, in case any of the devisees die under age, the latter limitation explains the sense in which the words of contingency were used to be, not that of importing a condition precedent to the vesting of the estate under the first devise, but a condition subsequent, on failure of which their estate may be divested; not a description of the time when it is to vest in and be taken by the children, but of the time when the estate already vested in them is to become indefeasible (d). That doctrine appears from several cases.

(a) See *Bonater's case*, 1 S. Co. 10; and *Sir J. Williams's argument*, 1 New R. 512.

(b) See the record in this case, *Bromfield v. Crayder*, 1 New R. 324, n. 3 Levinz. 132; S. C. 1 Watkins on Copyholds, Vidal's ed. 312.

(c) Cro. Eliz. 122.

(d) See *Marryat's argument* in *Doe v. Nowell*, 1 M. & S. 331.

Edwards v. Hammond was supported in *Doe d. Wheadon v. Lee* (a), *Brownfield v. Crowden and others* (b), *Doe v. Moore* (c), *Doe v. Newell* (d), and *Farmer v. Francis* (e). In *Doe v. Moore*, which nearly resembles this case, Lord Ellenborough states the rule to be, that a devise to A. when he attains twenty-one, to hold to him and his heirs; and if he die under twenty-one, then over, does not make the devisee's attaining twenty-one a condition precedent to the vesting of the interest in him, but the dying under twenty-one is a condition subsequent, on which the estate is to be divested; and that whether the devise over be immediate or in remainder only. But *Montgomerie v. Woodley* (f) bears strongly against the construction, that in this case the estates were rendered contingent by the codicil. The testator there devised to trustees and their heirs to the use of his grandson W. C. M. *Montgomerie* for life, with remainder to his first and other sons in tail male, with remainders in strict settlement to grandsons yet unborn; and to this was added a clause, directing that none of the devisees named should take or come into possession of any of his estates before they should have attained the age of twenty-five years; and Lord Chancellor Eldon held, that the testator did not mean to postpone the time at which the estates were to vest, but only that when the devisees were to come into possession. Secondly, as there is no devise over in the event of all *Robert Brown Russell's* children dying under twenty-one, if that should happen, no one of their estates could be divested; for the rule applies that estates once vested shall never be divested, unless all the events take effect on which the divesting is made to depend; *Stur-*

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(a) 3 T. R. 41. (b) 1 New. R. 321. (c) 14 East, 601.

(d) 1 M. & S. 357; S. C. Dom. Proc. 5 Dow, 702; see *Ld. Wynford's* judgment.

(e) 2 Bing. 157; 9 B. M. 310.

(f) 5 Ves. 522.

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gess v. Pearson (a), *Harrison v. Foreman* (b). Thirdly, the word "surviving," in the codicil, must be read "other," so as to vest the shares of such children as shall die under twenty-one in all who attain that age; *Pettywood v. Cook* (c), *Harman v. Dickenson* (d), *Wilnot v. Wilnot* (e), *Barlow v. Salter* (f). Fourthly, the devise is to a class, and it being clearly intended that no child dying under twenty-one should take any benefit, the clause of survivorship in the codicil must pass the accruing as well as the original shares. For Sir J. Leach M. R. in *Banker v. Len* (g), after stating the general rule to be, that the clause of survivorship, unless extended by particular words, attaches only to the original shares, and does not affect the accruing shares, which therefore become vested in the individuals who are the survivors for the time being, declares the principal exception to be, where the disposition is not of separate legacies, but of one aggregate fund which the testator meant should remain an aggregate fund, and should not be broken into fragments, if some of the persons, to whom interests in it were given, happened to die. That devise was of real as well as personal property; and the principle laid down applies to both. Though *Woodward v. Glassbrook* (h) decided that the share which goes over on one child's death shall go to the survivor for life only, and shall not go over a second time, the devise there was of several parcels of land to several children. Lastly, as there is no clause providing for accumulation of rents, then if the children take vested interests they are entitled to the rents of their shares from the death of their father, the last tenant for life; and if any shall die under twenty-one,

(a) 4 Mad. 411.

(b) 5 Ves. 207; 1 Ves. jun. 562, *Graves v. Bainbridge*.

(c) Cro. Eliz. 352.

(d) 1 Bro. C. C. 91.

(e) 8 Ves. 10.

(f) 17 Ves. 479.

(g) *Turner & Russ*. 415.

(h) 2 Vern. 388.

their representatives will be entitled to the rents of their shares up to their deaths; *Shepherd v. Ingram* (a), *Montgomery v. Woodley* (b).

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*Coots* appeared for the residuary devisees under *A. Brown's* will, but was not heard, as on the case sent to this court by the Vice-Chancellor it did not appear that they were parties to the cause.

*Preston* in reply. The present case differs from those cited in this important particular, that the codicil here expressly directs that the devisees shall not take "vested interests" till twenty-one; and as nothing shows the testator's intention to use the word "vested" in any other than its technical sense, it must be construed in that sense. Then unless the court strikes out the words "unless" or "until," the estates are contingent. These limitations are purely legal, subject to the rule of law, that a contingent remainder is destroyed by the determination of the particular estate before the contingency happens. But *Montgomery v. Woodley* was a case in which the legal estate being vested in trustees, a court of equity was called on to deal with matters of purely equitable jurisdiction, viz. savings out of the rents and profits. In *Edwards v. Hammond* the limitations were of copyhold, where this rule of law does not apply (c). The right to a vested estate cannot be possessed without the accompanying right to the rent and profits. If it is admitted that the devisees' right to them would be suspended till attaining twenty-one, the consequence is, that the estate itself is gone by the failure of the particular estate

(a) Ambler, 448.

(b) 5 Ves. 522; and see *Nicholls v. Osborne*, 2 P. Wms. 419; *Taylor v. Johnson*, id. 505.

(c) But see *Watkins on Copyholds*, vol. i. 192, 197, *Vidal's* edit.

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before it could vest; *Leek v. Robinson (a)*, *Judd v. Judd (b)*. If real estate is limited to *A.* for life, with an intervening chasm of a single day, a subsequent remainder to *B.* for life is destroyed.

Cyr. adv. null.

The following certificate was afterwards sent:

This case has been argued before us by counsel; we have considered it, and are of opinion:—

In answer to the first question, That *Robert Brown Russel* took a fee in the property in question, as the heir at law of the testator *Robert Brown*,

In answer to the second question, That the defendants *Frances Russel*, *Mary Russel*, *Elizabeth Russel*, *Ellen Russel*, and *Jane Russel*, the infants, take no interest in the property in question, either under the will and codicil of *Robert Brown*, or as the heiresses at law of *Robert Brown* or *Robert Brown Russel*.

In answer to the third question, That *Elizabeth Sheriff Russel*, *Robertson Buchanan*, and *Nathaniel Nicholls* take a fee in the property in question, under the will of *Robert Brown Russel*.

LYNDEHURST,
J. VAUGHAN,
W. BOLLAND,
J. WILLIAMS.

April 1854.

(a) 7 Mees. 333, 347.

(b) 5 Simons' R. 502.

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DEBT on a judgment recovered in a county court.

The declaration stated, that the plaintiff on &c., in the county court of J. H. esq. and R. P. esq., sheriff of the county of *Middlesex*, holden &c. at the house known &c. in and for the county of *Middlesex*, and within the jurisdiction of the said court, before the said sheriff and the suitors of the same court, (and by the judgment of that court) recovered against the said defendant 77*l.* 8*s.* 6*d.*, which to the said plaintiff were in the said court of the said sheriff before the said sheriff and suitors then and there adjudged to the said plaintiff, as well for his damages which he had sustained in a certain action of a plea of trespass on the case, prosecuted in the said court by the said plaintiff against the defendant, by virtue of his majesty's writ of justices, to the sheriff of the said county of *Middlesex* directed, as for his the said plaintiff's costs &c., whereof the said defendant was convicted, as appears by the said writ of justices, and the proceedings had thereon in the county court office of the said sheriff of *Middlesex* now remaining, and otherwise will appear, and which said judgment now remains in full force and effect &c. It then stated that the plaintiff caused process of execution to issue directed to the proper officer, who returned that the defendant had no goods &c. within his bailiwick, whereof he could levy the damages &c., and that the defendant had not yet paid &c., whereby an action hath accrued &c. The declaration concluded thus: And the said plaintiff exhibits into court the said writ of justices to the said sheriff of *Middlesex* directed, which gives sufficient evidence thereof, and avers that he is ready and willing to prove the said processes and proceedings of the said court of

In an action of debt on a judgment of an inferior court, the declaration is bad on demurrer, if it does not contain an averment that the cause of action arose within the jurisdiction of the court below: it is not enough to allege that the plaintiff recovered his damages within that jurisdiction.

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the sheriff of *Middlesex*, held before the said sheriff and suitors of that court, by which the said judgment manifestly appears to be in full force and effect and unsatisfied,—which witness the said debt in form aforesaid.

General demurrer and joinder.

Kelly in support of the demurrer. The declaration is bad for not showing that the cause of action in respect of which the damages were given accrued within the jurisdiction of the county court; for want of jurisdiction is always presumed against inferior courts. The allegation that the plaintiff in the court of the sheriff, and within the jurisdiction of that court, recovered his damages, only shows the court to be locally situated within the sheriff's jurisdiction. On demurrer to a declaration in debt upon a judgment of commissioners who had been made a court of record by a local statute (a), *Willes* C. J. stated the rule to be, "that nothing must be intended in favour of their jurisdiction, but that it must appear by what is set forth on the record that they had such jurisdiction; *Sollers v. Lawrence* (b), *Ladbroke v. James* (c). A party who pleads a justification under process of an inferior court, must show that the cause of action arose within the jurisdiction of that court, *Evans v. Munkley* (d), although one of its officers need not; *Moravia v. Sloper* (e), *Herbert v. Cook* (f), *Saffery v. Jones* (g), *Peacock v. Bell* (h). So, where a judgment in an inferior court was pleaded, without stating that the consideration arose within the jurisdiction, a replication that the plaintiff and defendant

(a) 5 Geo. 2. c. 16., to determine disputes touching the rebuilding of houses in the town of *Blandford* which had been destroyed by a fire.

(b) *Willes*, 413.

(c) *Ib.* 199.

(d) 4 Taunt. 48.

(e) *Willes*, 30.

(f) *Ib.* 36.

(g) 2 B. & Ad. 598.

(h) 1 Wms. Saunders; 74, s. n. (1.) and cases there cited.

both resided out of the jurisdiction, and that the cause of action arose out of it, was on demurrer held sufficient; *Briscoe v. Stephens* (a), and the cases there considered; *Mico v. Morris* (b), *Adney v. Vernon* (c). In an action in an inferior court the omission of an averment that the consideration of the promise arose within the jurisdiction, is error even after verdict; *Trevor v. Wall* (d).

Mahon for the plaintiff. Mr. Chitty, in his work on Pleading, lays it down, that even in pleading the judgment of an inferior court it is sufficient to state shortly that the plaintiff by judgment of the court recovered, whether it be a court of record or not, and it is not necessary to set out the cause of action, or that the defendant became indebted within the jurisdiction of the court. For this he cites 1 *Saunders*, 92, n. 2., where the authorities are collected. In an action for rescuing a debtor taken upon mesne process out of the palace court, the want of an allegation that the cause of action arose within the jurisdiction is not sufficient ground to arrest the judgment; *Bentley v. Donnelly* (e). So it is enough in a plea of justification under mesne process for defendant to state that the writ issued on an affidavit to hold to bail; and it is not necessary to state the cause of action, because that is not traversable; *Belk v. Broadbent* (f). The court will now presume that the cause of action arose within the jurisdiction. *Rowland v. Veale* (g) was a demurrer to a plea of justification of an imprisonment under process from the *Trematon* court. Because the plea did not set forth the cause of action, Lord Mansfield said, "If it did

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(a) 2 Bing. 213.

(e) 1b. 243. Roll. Ab. Escape, F. pl. 3.

(c) 8 T. R. 27. (f) 3 T. R. 182.

(b) 3 Lev. 23.

(d) 1 T. R. 152.

(g) Cowp. 18.

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ent, the defendant should have availed himself of the omission by plea in the court below; it would have been a ground of defence there, but it is not to deprive the plaintiff of his action here. If it was not alleged in the plea below to be within the jurisdiction, it would have been bad on error or writ of false judgment, and so he might have taken advantage of it". (a). [Lord Lord-heret C.B. But Lord Mansfield goes on to say that there "it is expressly not forth that the plea was for a cause of action arising within the jurisdiction of the court." There are no such words here; the averment that the plaintiff recovered his damages in the sheriff's court, amounts to nothing.] Even if matter arise extra jurisdictionem, and plaintiff declares infra jurisdictionem, though the defendant may plead to the jurisdiction of the court, if he waives that and pleads to the merits, he cannot take advantage of their want of jurisdiction; for by the averment of the court, and his own admission, he is stopped from saying that it was a matter that arose out of their jurisdiction; *Leaking v. Denning* (b). Here, the jurisdiction of the court is averred in every count in the declaration below, and the plaintiff need only aver that judgment was recovered on it; *Bentley v. Donnelly* (c). [Bollard B. Lord Kenyon's judgment in that case shows that the decision was on the ground of its being a motion in arrest of judgment after verdict; as he says that the case in *Salk.* 201. would not alone have induced the court to come to that conclusion, but that *Bull v. Steward* (d) was a direct authority. In that case the court resolved, "this being after verdict, we will suppose every thing proved at the trial which was necessary to be proved, and that the cause of action arose within the jurisdiction, unless the contrary be made to appear upon the face of this

(a) Cowp. 30.

(b) 1 Salk. 202.

(c) 8 T. R. 127.

(d) 1 Wils. 255.

record. 7.] Of late years objections in point of form have been observed in order that the parties might come in to combat the real merits. To take advantage of the omission to state that the consideration arose within the jurisdiction, the party should proceed by writ of error; *Cadmore v. Tripe* (a), *Tyver v. Wall* (b). [Bolland B. In an action of debt brought by the defendant in an inferior court upon a judgment of nonsuit, the declaration contained the same averments as here; and although an objection was made that it did not allege that the plaint was laid for a cause of action arising within the inferior jurisdiction, the court held it to be very good both in form and substance, as the nonsuit was laid to be given and recorded at a court held within its proper jurisdiction; *Murray v. Wilson* (c).] So, where the declaration in an inferior court stated that the cause of action arose within the jurisdiction, and a verdict passed for the plaintiff, the defendant below, in an action of trespass against the plaintiff for false imprisonment, by arresting him on that judgment, cannot reply to a justification under the process that the cause of action did not arise within the jurisdiction; *Higginson v. Martin* (d). This case is confirmed by the modern authority of *Rowland v. Keble* (e); and as here the plaintiff has acquiesced in the judgment of the court below, the grounds of it cannot be inquired into at the bar.

(a) 5 Mod. 28. (b) 1 T. R. 151. (c) 1 Wils. 214.

(d) 2 Mod. 195, 4th point; 8. C. 4 Freem. 322. where *Seymour J.* is reported to have held that the plaintiff was estopped from replying that the cause of action did not arise within the inferior jurisdiction, because he had obtained a judgment which was still in being; and so long as that continued in force, it should protect those who acted under it until reversed by writ of error: but the other three judges are said to have been of a contrary opinion, and judgment was given for the plaintiff.

(e) Comp. 10.

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*Kelly* in reply. The cases are all reconcilable. As to *Murray v. Wilson*, it was immaterial whether the cause of action arose within the jurisdiction or not. [Lord *Lyndhurst* C. B. The court there went out of its way when it expressed itself strongly on the form of the declaration: that was not in question in an action to recover the costs of a nonsuit, as the plaintiff would not be the less liable to be nonsuited because the cause of action arose within the jurisdiction.] The judgment of nonsuit was said to have been given in a court which had jurisdiction, and that is enough: so it would have been if judgment had been for the defendant, or of non pros on the plaintiff having failed to proceed. [Lord *Lyndhurst* C. B. If an action is brought for a cause not arising within the jurisdiction, but the plaintiff alleges it to be within it, and fails in proof of that fact, he is nonsuited, and a judgment of nonsuit is entered, on which the defendant is entitled to costs. If an action were brought by the defendant on the judgment for those costs, he could not aver a cause of action arising within the jurisdiction of the inferior court, but yet he would be entitled to recover.] That case is an authority that the court will not compel the defendant below to make an averment which it is impossible that he can prove. It is a fallacy to put the objection on a want of jurisdiction. The court below can give judgment for a defendant, whether it has jurisdiction over the cause of action or not. [Lord *Lyndhurst* C. B. In the case of *Bentley v. Donnelly* (a), which was for the rescue of a debtor taken on mesne process, the court held the averment of jurisdiction not to be necessary.] That, and the case of *Lucking v. Denning* (b), which has also been referred to, both came before the court after verdict on

(a) 8 T. R. 127.

(b) 1 Salk. 204.

a motion in arrest of judgment, not on demurrer; and the court refused to disturb the verdicts, on the principle of supposing every thing to have been proved that was necessary. [*Bolland* B. Lord *Kenyon* puts the judgment on the sufficiency of the declaration, saying, "that it is not necessary in such an action to state that the cause of action arose within the jurisdiction of the inferior court." *Vaughan* B. *Luching v. Denning* (a) one of the cases relied on by Lord *Kenyon*, does not apply, because it is decided expressly on the ground that where the plaintiff declares of a matter as arising *infra jurisdictionem*, which in fact does not so arise, and the defendant does not plead to the jurisdiction of the court, but waives it by pleading to the merits, he is estopped by the averment in the count and his own admission from saying that it was a matter arising out of the jurisdiction (b).] The reason of the decision of Lord *Kenyon* would be against the authority of all the cases and the known difference between cases after verdict and on demurrer. The case of demurrer to the declaration, where nothing has been proved in the court above, is yet an untouched question. *Belk v. Broadbent* (c) only determines that the original cause of action is not traversable where a superior court, and *Rowland v. Vvale*, where an inferior court of competent authority has decided it;

(a) 1 Salt. 201.

(b) Nor does *Hull v. Steward*, 1 Wils. 255, the other cases cited by Lord *Kenyon* in *Bentley v. Donnelly*, warrant the general proposition that it is not necessary in the declaration to aver that the original cause of action accrued within the jurisdiction; for there, in answer to the objection, that the allegation was only in general that the defendant below was indebted to the plaintiff, the court held, "that after verdict we will suppose every thing proved at the trial which was necessary to be proved, and that the cause arose within the jurisdiction, unless the contrary could be made to appear upon the face of this record."

(c) 3 T. R. 183, per *Buller* J. 185.

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but not that the jurisdiction of the court may not be traversed; and if it had decided otherwise, it would be contrary to the case of *Tollers v. Lawrence* (a). But *Briscoe v. Stephens* (b) is conclusive on the point. [Lord Lyndhurst C. B. Is there any case expressly of debt upon a judgment?] That which most nearly resembles it is *Richardson v. Barnard*, in *Rolle's Abridgment* (c), which was an action in the King's Bench for an escape from execution upon a judgment in the court of *Kingston-upon-Hull*, in an action on an obligation stated to have been made at *Halifax*. It was not averred that *Halifax* was within the jurisdiction of the court, and the King's Bench, after verdict, arrested the judgment on the ground of the insufficiency of the declaration. If, in an action for an escape, where the proceedings below are stated by way of inducement only, such an averment is required, it is much more necessary here when the whole foundation of the action is the judgment in the court below. As there is no direct instance of an action of debt on a judgment, the question turns upon the principles of law and the practice, and the best forms will have weight; as in the case of affidavits to hold to bail, the established forms have been adhered to by the courts. As to the practice, the form in use is in the note to *Pitt v. Knight* (d), which contains the very words, "for a cause of action arising within the jurisdiction of the court;" and the whole law as collected there shows that they are necessary. As to the principle, *Sellers v. Lawrence* (e) shows that jurisdiction in an inferior court is never to be presumed.

Lord LYNDHURST C. B.—The subject of this general demurrer is the want of an allegation, that the

(a) Willes, 413.

(b) 2 Bing. 213.

(c) tit. Escape, F. f. 3.

(d) 1 Saund. 92.

(e) Willes, 413.

cause of action in the original suit arose within the jurisdiction of the inferior court. The rule as laid down in *Chitty on Pleading* (a) does not prescribe such an averment; a passage in Serjt. *Williams's* notes to *Pitt v. Knight* is there quoted (b), in which authority are, however, found these material words, "that the plaintiff levied his plaint in a certain plea of &c., for a cause of action arising *within the jurisdiction* of the court." The words are marked in italics in the note in *Saunders*, are inserted in another passage of the text book quoted (c), and form the foundation of Lord *Mansfield's* judgment in *Rowland v. Veale*. There, to an action for false imprisonment, it was objected that it should appear on the plea what the cause of action was, or that the defendant became indebted within the jurisdiction; but as it was stated that the plaintiff below levied his plaint "for a cause of action arising within the jurisdiction of the court," it was held good. However, as there appears some difference of opinion on the point amongst the text writers, we will take time to look into the authorities.

On a subsequent day the lord chief baron said, that the court had conferred with the other judges on the subject, who concurred with this court in opinion that the objection to the declaration was valid, and the demurrer must be allowed. But they gave leave to the plaintiff to amend.

(a) Vol. I. 357. 3d ed.; 340. 4th ed.

(b) 1 Saund. 92, n. 2.

(c) 1 Chit. on Plead. 280, 281. 3d edit.; 250. 4th ed.

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GARDNER and Another *against* BOWMAN.

The words "undertook and agreed to pay" in a quantum meruit count, do not necessarily import the form of action to be assumpsit, but are good in debt.

In an action of debt it is immaterial that the aggregate of the sums claimed in several counts exceeds the amount claimed in the *queritur*.

No objection on the ground of superfluity of counts, can be taken on demurrer, but it must be the subject of motion. (*Reg. Gen. Hil.* 4 W. 4. No. 6.)

**D**EBT. The declaration was entitled 1 *January* 1834, and after reciting that the plaintiffs "demand of the defendant the sum of 20*l.*," stated in the first count, that the defendant was indebted to the plaintiffs in the sum of 10*l.* for work and labour as surgeons and apothecaries, and for medicines supplied to the wife of the defendant; concluding with *actio accrevit* to the plaintiffs to demand and have 10*l.*, parcel of the said sum above demanded. The second count stated, that in consideration that the plaintiffs, at the like special instance and request of the said defendant, had before that time done &c. other work &c., as surgeons &c., for the said wife of the defendant, at his special instance and request &c., he the said defendant *undertook*, and then and there *agreed* to pay the said plaintiffs as much money as they reasonably deserved to have &c. Third count, that whereas the defendant on &c., at &c., was indebted to the plaintiffs in 10*l.* for goods sold, and 10*l.* for work, 10*l.* for money lent, 10*l.* for money paid, 10*l.* for money received, and 10*l.* on an account stated &c.: Whereby and by reason of the non-payment thereof, an action hath accrued to the said plaintiffs to demand and have of and from the said defendant the said several monies respectively amounting to the sum of 20*l.* &c. Demurrer, assigning for cause, that although the supposed causes of action in the first and third counts are for debts, and in the action of debt, yet the supposed cause of action in the second count is for the breach of a promise or undertaking, and ought not to be joined with the supposed causes of action in the first and third counts, and that it does not appear by the said declaration for what

cause or causes of action the plaintiffs demand the sum of 20*l.* in the said declaration mentioned, or upon which of the several sums of money therein mentioned the said action hath accrued to the plaintiffs &c. Joinder in demurrer.

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*Mansel* in support of the demurrer. The declaration is filed since the *Reg. Gen. Trin. T. 1 Will. 4.*, by the effect of which [Vol. I. 25.] the count on a quantum meruit is abrogated; for although no forms in the action of debt are given, the rule says, "If any declaration in *debt* to be filed and delivered for similar causes of action (to those mentioned in the schedule of forms and directions annexed to the order,) and for which the action of assumpsit would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeeds in such cause." And no count on a quantum meruit is there set forth. Again, here is a misjoinder of counts; the action is brought in debt, but the quantum meruit count is in assumpsit; although the word "agreed" might support a count in debt, as in the form in *Chitty's Pleading*, Vol. 2. (a), yet "undertook" imports a promise, and fixes the form of action as assumpsit, *Dalton v. Smith* (b). Nor is the cause of action set out with sufficient certainty, for the sum claimed in the writ should be the aggregate of all the sums stated to be due in all the counts.

*Comyn* for the plaintiff. The question of the insertion of the quantum meruit count under the new rules does not arise on demurrer, and the sum demanded in debt is immaterial; *M'Quillan v. Cox* (c), *Lord v. Houston* (d). He was then stopped by the Court.

(a) 3d ed. 180.

(b) 2 Smith's Rep. 618.

(c) 1 H. Bl. 249.

(d) 11 East, 62.

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LORD LYNTHURST C. B.—The argument for the defendant is wrong, both according to the authorities and the practice. The words “undertook and agreed,” are in all the common forms, and the case of *Nisara v. Bland* (a) shows there is nothing in this objection. There is no word of “promise” in the count here, as in *Dalton v. Smith*, where it was averred, that “the defendant undertook, and then and there promised to pay.” As to the objection, that the aggregate of the sums claimed in each count amounts to more than the debt claimed, that is immaterial. The moment that the court decided in *M’Quillan v. Cox* that the amount demanded in debt was immaterial, there was an end of the question, and the sum stated in each count is wholly immaterial. If the record had been improperly incumbered, the defendant might have moved to strike out those counts; but he has demurred, and as there is no suggestion that he has merits, there must be

Judgment for the plaintiff.

(a) 3 Smith’s Rep. 114.

#### ASHBY against GOODYER.

It is no ground for bringing up a prisoner by habeas corpus, that the sheriff’s warrant to the officer and gaoler, under which he was arrested and detained, did not state the court out of which the writ issued, it not being shown that a copy of the process was not delivered to him at the time of executing it, pursuant to 2 W. 4. c. 39. s. 4.

**HUMFREY** moved for a rule to show cause why a habeas corpus cum causâ should not issue to the gaoler of *Northampton* gaol, on the ground that the sheriff’s warrant to his bailiff and the gaoler, directed the one to take and the other to detain the de-

fendant till bail be put in, or a certain sum be deposited with the sheriff in lieu of bail, according to 7 & 8 *Geo.* 4. c. 71., in an action on promises; without stating out of what court the writ issued, so as to enable him to put in bail.

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Lord LYNDEHURST C. B.—In the form in *Tidd's New Supplement*, 274. the sheriff commands the bailiff to deliver to the defendant a copy of such process at the time of executing it. That is in pursuance of 2 *W.* 4. c. 39. s. 4., and would show the defendant the court out of which the writ issued. It is not suggested that by misadventure the copy of the writ was not delivered in this case to the defendant; but as it stands here, we must take it that when the warrant was executed the copy of the writ was delivered at the same time. Then how was it material to the defendant that the mere warrant of the sheriff authorizing his officer to make the capture should state out of what court the writ issued?

*Humfrey* took nothing by his motion.

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CHARLES LEONARD *against* WILSON, (one of the  
Public Officers of the Bank of *Liverpool*.)

**A**SSUMPSIT on a bill of exchange, by indorsee against indorser. Plea: general issue (pleaded  
A bill accepted payable at a *London* bankers, indorsed in blank by the payee, was indorsed over by subsequent holders, who added these words, "In need *Smith, Payne & Co.*" to their indorsement. It was afterwards indorsed in blank several times, and at last to the *Liverpool* Bank, who indorsed it specially, "Pay Messrs. *Terney and Farley* or order." *Terney and Farley* indorsed in blank to plaintiff, writing thereon "*Thomas Terney and Farelley.*" It was afterwards indorsed in blank to several others, and when due was duly presented at the *London* bankers, at which it had been made payable. The answer was "no advice." On the same day it was presented, according to the previous memorandum, to *Smith, Payne & Co. London* bankers, who refused to pay it, on the ground

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upon the first day of this term). The plaintiff and defendant having agreed to make the facts a special case, for the opinion of this court, under statute 3 & 4 W. 4. c. 42. s. 25. an order was made accordingly, and the following is the special case:

This action is brought by the plaintiff as indorsee of the bill of exchange described in the declaration, against the defendant, who is admitted to be one of the public officers of the joint stock company of the bank of *Liverpool*, appointed to be sued in respect of the liabilities of that bank. The following is admitted to be a copy of the bill, and the indorsements upon it.

18l. 5s. 0d.

*Denton, May 6, 1833.*

Three months after date pay to my order eighteen pounds five shillings for value received as advised.

Mr. *Samuel Oldacre,*

*Robert Marlow,*

Hatter, *Stourbridge.*

3) *J. H. 9 Aug. 1833.*

(Accepted)

Payable at Messrs. *Spooner, Attwoods & Co.*

Bankers, London.

*Samuel Oldacre.*


(Indorsed)

Pay to the *Manchester and Liverpool District Banking Company* or order, *Robert Marlow*—Pay Mr. *James Ingham* or order, For the *Manchester and Liverpool District Banking Company*, p pro. *B. Tomlins*, manager for *Ashton, Joseph Hudson*. [In need *Smith, Payne & Co.*]*—James Ingham—William Kershaw—*

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of the mis-spelt indorsement of *Terney* and *Farley*. The case stated between the parties, admitted the custom of *London* bankers to be to refuse payment of all bills, even those accepted by themselves, if the indorsement be not correct to a letter. Due notice of dishonour being given to the plaintiff, the bill was returned to him, and he gave due notice of dishonour to the *Liverpool Bank*, who subsequently pointed out the irregularity to the plaintiff. By their advice he sent the bill to *Terney* and *Farley* in *Ireland* to rectify, and indorse it *Terney* and *Farley*. They did so, and the bill was sent up to *Smith, Payne & Co.* who refused payment as overdue:—Held, that the bill having been regularly presented and dishonoured, and due notice of dishonour given to the *Liverpool Bank*, they were liable to pay the amount to the plaintiff.

*James Moor—John Syms—Patrick Leonard—p pro.*  
 The Bank of *Liverpool* (a), *Edw. W. Ward*, sub-  
 manager—Pay Messrs. *Terney and Farley* or order,  
*Charles Leonard* (b)—[*Terney and Farley* (c)]—*Thomas*  
*Terney and Farelley—Henry Smith—Pay Messrs.*  
*Ransom & Co.* or order, *J. B. Bell & Co.—Ransom &*  
*Co.—Roberts & Co.—W. E. Hammond.*

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The Bank of *Liverpool* paid away the bill to the plaintiff, and indorsed it. The plaintiff paid and specially indorsed it to Messrs. *Terney and Farley*, who are graziers in *Ireland*, and deal with the plaintiff. *Terney and Farley* paid it to *Henry Smith*, but indorsed it in this name *Thomas Terney and Farelley*.

On 9 August 1833, when the bill became due, it was presented for payment at Messrs. *Spooner, Attwood & Co.* bankers, *London*, at whose bank it is accepted, payable. They refused to pay it, and gave for answer "No advice." It was noted on the same day, and on the following day, the 10th, it was presented at Messrs. *Smith, Payne & Co.* bankers, *London*, to whose house it was referred for payment, "in case of need," by the *Manchester and Liverpool District Bank*, one of the indorsers. *Smith, Payne & Co.* refused payment, on the ground solely of the irregularity of *Terney and Farley's* indorsement. The answer they gave was, "wants the indorsement of *Terney and Farley*." The custom of the *London* bankers is to refuse all bills, even their own acceptances, where there is an irregularity in an indorsement, even to the variation of a letter.

The bill thus dishonoured was returned, and notice given in due course, through the latest indorsers, to *Henry Smith*, and by him to *Terney and Farley*, and

(a) Real defendants.

(b) Real plaintiff.

(c) These names were thus supplied in red ink on sending back the bill to T. and F. See p. 418.

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by them to the plaintiff, who resides at *Liverpool*, and by him to the Bank of *Liverpool*. On *Tuesday* morning, 20th *August*, plaintiff went to the bank, and saw Mr. *Langton*, who pointed out to him that the reason of the refusal by *Smith, Payne & Co.* was the irregularity in *Terney* and *Farley's* indorsement, and recommended him to send it back to *Terney* and *Farley* to get the mistake rectified, and advised him also to write to the acceptor. Plaintiff sent the bill back to *Terney* and *Farley* that same day, *Tuesday* 20th *August*. The bill was never passed through the books of the bank, who merely kept a memorandum of it, but of that fact the plaintiff was ignorant. The bank of *Liverpool* did not give notice of dishonour to any prior indorser on the bill.

On *Tuesday*, 27th *August*, plaintiff brought back the bill to the bank of *Liverpool*, with the indorsement of *Terney* and *Farley* supplied, as in brackets, in red ink, and requested them to send it up again, through their agents, *Glyn & Co.*, to *Smith, Payne & Co.* They did so on the same day, and *Smith & Co.* on this second presentation refused to interfere, because the bill was now overdue. The plaintiff took up the bill, and requested payment from the bank of *Liverpool*, who refused payment under the circumstances stated. The question is, Whether the plaintiff is entitled to recover.

*Tomlinson* for the plaintiff. The plaintiff is entitled to recover. The bill being indorsed in blank by the *Liverpool* Bank, was presented by a bona fide holder for value at the house of *Spooner* and *Attwood*, where it was accepted payable (a). Payment was there refused, not on account of the mis-spelt indorsement, but merely for want of advice. Notice of dishonour was

(a) *Saunderson v. Judge*, 2 H. Bl. 509; *Tritcher v. Blanton*, 4 B. & Ald. 413.

then duly given, and, as the plaintiff afterwards took up the bill, his title is complete. The bonâ fide holder who presented at *Spooner's*, was not bound to apply to *Payne and Smith* (a) according to the suggestion on the bill, "in case of need," but as he could make a good title through the indorsement by the *Liverpool* Bank to himself, preceding that by *Terney and Farley*, he was entitled to sue the *Liverpool* Bank notwithstanding the subsequent indorsement by *T. and F.*, which was objected to as incorrect. In *Smith and Others v. Clarke* (b), a bill was originally indorsed in blank, and afterwards *specially* to one *Jackson*. He parted with it without indorsing it, and it was objected that a subsequent holder for value could not recover, even against the acceptor, without such indorsement; but Lord *Kenyon* said, "The fair holder of a bill may consider himself as the indorser of the payee, and strike out all the other indorsements. This special indorsement being made after the payee had indorsed, cannot affect the title of the present plaintiffs. The facts there were more adverse to the plaintiff than the present, for an irregularity had accrued there between the holder and the general indorser, whereas here it took place after the holder's title to sue was complete. Had the irregularity been, not that *Jackson* did not indorse, but that he indorsed, adding his christian name or some matter making it a more specific indorsement than the description on the bill, it would have very closely resembled this case. The mis-spelling made no difference, for it is not surmised that the indorsement was not to *Terney and Farley*, though they indorsed their firm with more particularity of spelling than those who indorsed to them. In *Peacock v.*

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(a) *Esau v. Russell*, 4 M. & S. 305; *Price v. Mitchell*, 4 Campb. 200.

(b) *Peake's C. N. P.* 325, and 3d ed. 296; *Bayley on Bills*, 4th ed. 101.

See 1 Esp. C. N. P. 179.

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*Rhodes* (a), a bill payable to order and indorsed in blank was stolen, and it was held that the plaintiff, who took it bonâ fide for valuable consideration, might recover against the drawer, as there was no difference between a note payable in blank, and one payable to bearer. [Lord *Lyndhurst* C. B. It was not necessary as between these parties that the bill should be presented to *Payne* and *Smith* at all. The bank of *Liverpool* are subsequent indorsees to the *Manchester and Liverpool* district bank. The latter are not the defendants in this case, so that the custom of the *London* bankers with reference to the act of *Payne* and *Smith*, who appear to have represented the district bank, does not affect the case as regards the plaintiff, but only applies to the presentment to *Payne* and *Smith*, who assign as a reason for their non-payment, that the bill, as then indorsed by *Terney* and *Farley*, did not duly authorize them to pay. Messrs. *Spooner* and *Attwood*, at whose bank the bill was made payable, made no objection to the mis-spelling, but refused to pay for want of effects.] The plaintiff's application to *Payne* and *Smith* was merely in compliance with the suggestion on the bill, and in hopes that they would take it up for the district bank. *Edie v. East India Company* (b) is in point, to show that no custom can alter a general rule of law.

*Crompton* for the defendant. The drawer and all the parties to this bill, except the acceptor, are discharged by the laches of the holder, in not presenting it at *Spooner* and *Attwood's* in a proper state. It may be conceded that after a general indorsement, a bonâ

(a) Doug. 611, 633. As to terms of restrictive acceptances, see *Archer v. Bank of England*, Doug. 637; *Sigourney v. Lloyd*, 8 B. & Cr. 6, 22; S. C. in error, 6 Bing. 525.

(b) W. Bla. 295; Burr. 1224, 1226, 1228.

holder may sue the acceptor on title derived from that indorsement, notwithstanding any error in the intermediate indorsements. But this plaintiff was in the same situation as *Terney* and *Farley*, and if he was discharged, he paid them in his own wrong, by which act he did not put himself in a different situation from theirs; *Turner v. Leech* (a). First, there was no due presentment, according to the usage of merchants, of the bill in a proper state, nor any default so as to charge the drawer or indorsers. *Smith v. Clarke* was an action against an acceptor. The drawer and indorsers are only collaterally liable as sureties to pay, if the drawee does not pay after the bill has been presented to him in that proper state in which he ought to pay it, and would be safe in so doing. Now this bill was not presented in that proper state which the usage with so much reason requires. This is a new case, in which evidence of usage is admissible to prove the mode of presentment (b). So if the law be doubtful, supposing it to have been stolen, and the defendants to have paid it, notwithstanding the irregular indorsement, that fact would have been evidence that they paid it without due caution. Though the refusal by *Spooner's* was put on the ground of "no advice," that makes no difference, for the drawer and indorsers were entitled to have the bill presented in a proper state for payment.

Secondly, *Terney* and *Farley*, and persons in a similar situation with them, could not sue the drawer for a damage occasioned solely by their own negligence, or indorsing contrary to mercantile usage, *Easley v. Crock-*

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(a) 4 B. & Ald. 451.

(b) Chitty on Bills, 142, 5th ed. citing *Stone v. Rawlinson*, Willes, 561, Doug. 653 n. Custom as to presentment within banking hours, *Parker v. Gordon*, 7 East, 385; *Elford v. Teed*, 1 M. & S. 28.

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*ford* (a). For the contract resembles one of indemnity, in which the plaintiff's own default is an answer, that negligence occasioned the refusal to pay by the *London* agents of the *Liverpool* and *Manchester* district bank. Thirdly, the plaintiff by sending the bill to *Terney* and *Farley* in *Ireland*, and afterwards causing it to be sent to *London*, without relying on his prior notice, occasioned a delay, which discharged the defendants and other prior indorsers, who were thereby prevented from giving notice in time to those who preceded them. The plaintiff in fact elected to abide by the effect of presenting the bill with an amended indorsement to *Smith, Payne & Co.* [Lord *Lyndhurst* C. B. If the first notice to the defendants was regular, how could it be affected by what subsequently took place? Besides, *Spooner* and *Attwood's* objection to pay, was because they had no advice.]

*Tomkinson* in reply. *Spooner & Co.* would have been liable in damages, had they falsely answered "no advice," *Marzetti v. Williams* (b). The custom set up is inapplicable between these parties. It was by the defendant's advice that the bill was sent to *Ireland*.

LORD LYNDBURST C. B.—The defendants are admitted to have had due notice of the dishonour of this bill. The presentment at *Spooner & Co.'s*, where the bill was made payable, was also regular. It does not appear to me that the instruction or direction to *Smith, Payne & Co.* by one of the indorsers, at all affects these parties; for the holder was not bound to present the bill at that house. The result of the fact is this: The bill being accepted payable at *Spooner & Co.'s* was duly presented there on the day it became

(a) 10 Bing. 244.

(b) 1 Bar. &amp; Adol. 415.

payable. No objection was taken to the bill for any informality of indorsement, but payment was refused for want of advice, which must be taken to mean want of advice from the acceptor. It is clear that *Terney* and *Farley* had good title to the bill, and that their property in it passed by their indorsement, though their names were not spelt exactly right by the previous indorsers. Nor when the holder, to whom the interest passed, presented the bill at the bankers at whose house it was made payable by the acceptor, was it objected to on the ground of the mis-spelt indorsement, but solely on the want of advice. Probably they were aware that the firm consisted of persons named *Terney* and *Farelly*, and that the indorsement, as it stood, passed the property. *Terney* and *Farelly* had a clear right to sue on the bill after payment had been thus refused. Regular notice was given to the plaintiff, and by him to the defendants, as previous indorsers; then the subsequent circumstances are immaterial. I am of opinion that there is no valid bar to the plaintiff's recovering on this bill.

VAUGHAN B.—The bill was indorsed by the proper parties, the presentment was regular, and due notice was given to the indorsers. Nothing done subsequently took away the effect of the presentment. The mis-spelling could not affect the party's right to recover.

BOLLAND B.—The objection is the want of due notice. Now, the plaintiff was clearly entitled to sue on the bill, and so were *Terney* and *Farley*. The latter passed the property in it, by their indorsement, though they spelt one of their names *Farelly*, it having been indorsed over to them in the name of *Farley*. Then if the mistake is only in the way in which it was so indorsed to them, no difficulty arises between these

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parties. When presented at the acceptor's bankers, the answer was "no advice;" but the alleged ground of dishonour is not material, notice of the dishonour having been duly given to the parties immediately preceding, who might have in their turn given notice to the others. Then all has been done which the plaintiff was bound to do in order to recover. For though the bill was afterwards presented at *Smith, Payne & Co.'s*, and payment was refused on account of the wrong spelling, the parties were not bound to present it there. The second notice of this refusal could not impeach the first.

WILLIAMS B.—I am of the same opinion. The bill has been regularly presented for payment, and dishonoured, and notice of dishonour has been duly given. The holder was not bound to present it at *Smith, Payne & Co.'s*.

Judgment for plaintiff.

JANE COCHRAN, Administratrix of JAMES COCHRAN,  
deceased, *against* FISHER.

A ship's policy  
of assurance  
contained a  
memorandum

**A**SSUMPSIT upon a policy of assurance upon the ship *Cyclops*, to recover the sum of 50*l.*, being the in the margin, that the said ship was "warranted not to sail for *British North America* after 15 August 1831." On that day she was in dock at *Dublin* ready for sea, and having cleared for *Quebec*, was hauled out of dock into the *Liffey* as early in the afternoon as the tide permitted. The wind blowing strong and directly up the river, she could not set a sail, but was warped down about half a mile, when the tide falling she took the ground. The master knew at the time of leaving the dock that the ship could not get to sea that day. She was warped a little further next day, took the ground again when the tide fell, being still ten miles from the harbour's mouth. On the 17th, the wind having changed, she set her sails and got to sea.

*Held*, that if at the time of breaking ground in the harbour, and going down the river on the 15th, the captain acted *bonâ fide*, with intent to put himself in a more favourable position to proceed on his voyage, the warranty was satisfied, even though

amount underwritten on the policy by the defendant. The cause was tried before Lord Chief Justice *Denman*, at the *Lancaster* summer assizes 1833, and a verdict given for the plaintiff, subject to the opinion of the court on the following case:—On the 26th *February* 1831, *James Cochran* (the plaintiff's deceased husband) caused an insurance to be made on the ship *Cyclops*, of which he was master and part-owner. The policy of that date states that *John Dixon*, therein described as agent, as well in his own name as for and in the name and names of all and every other person or persons to whom the same did appertain in part or in all, did make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from and to any port or ports, place or places whatsoever and wheresoever, in any trade, for the space of twelve calendar months, commencing on 27th *March* 1831, and ending on 26th *March* 1832, both days inclusive, in port and at sea, at all times and in all places, and in all services, upon any kind of goods and merchandize, and also on the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel called the *Cyclops*, whereof was master for that present voyage *James Cochran*, or whomsoever else should go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, was or should be named or called, beginning the adventure upon the said goods or merchandize from the loading thereof aboard the said ship, at as above, upon the said ship &c., and so should continue

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he had *also* intended to comply with its terms; but that if he so moved the ship not in order to get a better position, but with the sole object of keeping within the letter of the warranty, it had not been complied with. This alternative not having been put to the jury, a new trial was ordered.

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and endure during her abode there upon the said ship; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandize whatsoever, should have arrived at as aforesaid, upon the said ship &c., and until she should have moored at anchor twenty-four hours in good safety, and upon the goods and merchandize till the same should be there discharged and safely landed: and it should be lawful for the said ship &c. in that voyage to proceed and sail to, and touch and stay at any port or places whatsoever, without prejudice to that insurance. The said ship &c., goods and merchandize &c., for so much as concerned the assured by agreement between the assured and assurer in that policy, were and should be valued at 1800*l.* on account of Captain *James Cochran*, and by a memorandum in the margin of the said policy the said ship was warranted not to sail for *British North America* after 15th August 1831.

The *Cyclops* had arrived in *Dublin* harbour from *Quebec* in *British North America*, about 1 August 1831, and on 10 August was chartered on a voyage back to *Quebec*. She was then lying in the custom-house dock, and great exertions were made by the master and crew to get her ready for sea on 15th August, on account of the warranty. On the morning of the 15th she was cleared at the custom-house, and was then in all respects ready for sea. She was then at the custom-house dock which opens into the river *Liffey*, which is part of *Dublin* harbour, having on each side of it quays where goods are constantly landed and discharged, and at half-past two in the afternoon of the 15th August, which was as soon as the tide permitted, she was hauled out of dock into the river, for the purpose of proceeding on her voyage to *Quebec*. The wind blew strong from E. S. E., which being right up the river no sail was or could be hoisted, and it was manifestly im-

possible for her to get out of the harbour. She was warped down the river about half a mile, when the tide had ebbed so much that she could not get any further, and before low water went aground, as is unavoidable in the *Liffey*. On the following day when the tide served, the wind continuing foul, she was warped further down the river, when she again took the ground from the falling of the tide, at a place being still ten miles from the harbour's mouth, and remained until the tide rose again on the next day, the 17th, the wind still blowing strong from E. S. E. and it being impossible to set or use the sails with any advantage, or to proceed to sea with the wind in that direction. Vessels cannot be warped below the *Pigeon-house*, which is about seven miles from the mouth of the harbour. On the 17th the wind changed to N. N. W., when the sails were immediately set, she proceeded to sea, and arrived safely at *Quebec*. The master and crew fully intended to sail for *Quebec* on the 15th *August*, if it had been possible, and did all they could, using every means and exertion to do so, and got the vessel out of dock, and warped her down the river as far as the depth of water enabled them, as before stated. But at the time the vessel quitted the dock, they knew it was impossible to get to sea that day.

The vessel was lost on her homeward voyage from *Quebec* in *December* 1831; and the question for the opinion of the court was, whether the warranty not to sail for *British North America* after 15th *August* 1831 had, under the above circumstances, been complied with? If the court should be of opinion that it had, the verdict for the plaintiff was to stand; if not, a nonsuit was to be entered.

*Wightman* for the plaintiff. The warranty was complied with by getting the ship quite ready for sea by

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the 15th of *August*, and on that day doing all that was possible to proceed on the voyage. [Lord *Lyndhurst* C. B. The case states every thing which is described upon the plan. If the ship had been warped to the extreme point to which she could be so moved, viz. the *Pigeon-house*, she could not have sailed further at that time, the wind being so directly adverse.] A distinction has been taken between a warranty to *sail*, and a warranty to *depart*. In *Moir v. Royal Exchange Assurance Company* (a), a ship warranted to depart from *Memel* on or before a certain day weighed anchor, but was beaten back and anchored again near the river's mouth. It was held, that the warranty was not complied with, and that it required departure from the port of *Memel*. *Gibbs*, C. J. saying, that had the warranty been to *sail*, he should have been of a different opinion. "To *sail*, is to sail on the voyage; to *depart*, must be to depart from some particular place." [Lord *Lyndhurst* C. B. This warranty is for commencing her voyage on or before 15th *August*.] The warping the ship down the *Liffey* is in effect the first step to commencing the voyage. [Lord *Lyndhurst*. Knowing that to be a useless step.] Not altogether; for some distance was accomplished; and no case has decided that a ship must go a particular distance in order to comply with a warranty, if the master, after having cleared the ship, *bonâ fide* takes every possible step to sail on his voyage. That is the result of all the cases collected in *Lang v. Anderdon* (b). Though he may know the attempt to be useless at the moment, he proceeds as far as he can in order to take advantage of a change of wind. [*Parke* B. Where the time of *clearing* was stipulated to be deemed the time of *sailing*, "provided the ship was then ready for sea," and the ship, after

(a) 6 Taunt. 241.

(b) 3 Bar. & Cr. 495.

clearing, quitted her moorings and sailed, but something remained to be done, viz. taking in more ballast, that was held not a sailing, as she was not ready for sea, *Pittegrew v Pringle* (a). [Lord Lyndhurst C. B. Was this ship in a better situation for sailing after being warped half a mile than she was before? In *Moir v. The Royal Exchange Assurance Co.* the ship got under weigh, intending to proceed to *England*, the morning being calm, and proceeded till interrupted by adverse wind; whereas here, though the ship moved, she had no prospect of proceeding to sea.] She made all the progress she could on the 15th in the only practicable way, and gained a day on her voyage, by being warped as far as one tide permitted, and was so much nearer the harbour's mouth as to be ready to set sail on a favourable opportunity. [Lord Lyndhurst C. B. By warping at successive tides the ship would have got to the *Pigeon-house*. There, as the passage is wider, she would have had a more favourable position for tacking and getting out, if the wind should continue adverse. On the 15th and 16th the ship was in progress, by warping to a better place near the mouth of the harbour, which she would ultimately have obtained by that means, if the wind had not changed on the 17th, when she set her sails.] The question is, whether the moving on the 15th, found by the case to have been for the purpose of proceeding on her voyage to *Quebec*, did not take place with the bonâ fide intention of complying with the warranty by *sailing* on her voyage, the warranty not being to *depart*. The fact of the ship being cleared, and in complete sea-going and sailing condition, distinguishes this case from *Ridsdale v. Newnham* (b), where, though the master sailed on the proper day, he did not clear at the

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(a) 3 B. &amp; Adol. 514.

(b) 3 Maule &amp; Sel. 456.

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custom-house on that day, so that he could not have proceeded on his voyage.

*Cresswell* for the defendant. The warranty was not complied with, and the acts of the master relied on for the plaintiff are merely in fraud of it. No sailing took place till the 17th, so that the winter risk was incurred, against which the warranty was directed. If the amount of distance for which the ship was moved was immaterial, the merely hauling her out of dock into the *Liffey* would have been a sailing and commencement of the voyage. The master, when he left the dock on the 15th, must have known it was impossible to proceed to sea on that day, and could not therefore have intended to do so. [Lord *Lyndhurst* C. B. At the moment he left the dock he could not have got to sea, but you cannot say he had not the intention to sail if the wind had shifted, as it might have done.] According to the argument, bringing the ship out of dock and changing her place in the *Liffey* would be equally a sailing, if she had been driven higher up. Setting a sail, or weighing an anchor in a harbour, is not sufficient, where it is known to be impossible to proceed to sea. In all cases where mere moving in harbour has been held sufficient, there has been reasonable expectation of getting to sea, *rebus existentibus*. This being a warranty not to sail after a certain day, is like a warranty to *depart*, and is therefore within *Moir v. Royal Exchange Assurance Co.*, which decided that shifting a ship's place in harbour is no compliance with the latter warranty. [Alderson B. The words are not "not to sail from the harbour of Dublin after such a day." Not to sail is not to begin to sail. Lord *Lyndhurst* C. B. Had the ship been warped to the *Pigeon-house*, and the wind had all at once become favourable, she might have gone out at once; whereas had she stopped

higher up, just before low tide, she would have been in a less favourable situation for getting out. *Parke B.* Probably, under the circumstances of the weather, the ship would never have been moved at all to the more exposed situation she took up, except in order to satisfy the terms of this warranty. We may infer that she would not otherwise have been moved.] The ship was never in fact unmoored; for warping on an anchor is done by carrying out a kedge and heaving to it by a windlass, so that she is always at anchor; one anchor is always down before the other is taken up. If a ship gets under weigh in harbour with a present purpose to sail, that is a sailing so as to save a warranty to sail from a place on a given day, *Lang v. Anderdon (a)*, but merely lifting an anchor in harbour is not. Can an attempt to sail be equivalent to sailing? [Lord *Lyndhurst*. If the master lifts anchor knowing it to be impossible to get out of the harbour, how can there be a *bonâ fide* intention to sail?] In *Nelson v. Salvador (b)* the ship had set some upper sails, weighed one anchor, and proceeded about thirty fathoms by heaving on the cable of her other anchor, when the master seeing a heavy swell setting in, deferred moving till next day: Lord *Tenterden* held, that the warranty "to sail on or before a particular day," meant that the ship should be on her voyage on the given day, and that it was not fulfilled in that case, as she did not completely unmoor on the appointed day, though she had her cargo and passengers on board, and was ready to sail. [Lord *Lyndhurst*. She never sails till the anchor is off the ground. *Alderson B.* In *Nelson v. Salvador* the second anchor was never weighed at all, and was not placed there in order to make progress by, as in the instance put of warping on a kedge.] The warranty is absolute; had it been

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(a) 3 B. &amp; Cr. 495.

(b) *Moody & Malkin*, 309.

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meant to stipulate respecting prevention by bad weather, the higher premium would have attached on the increased risk.

*Wightman* in reply. Whatever might be the exact time of the ship's sailing in this case, still whether she was subject to a warranty or not, she must at some time or other have gone down the river in order to get to sea. The means of so going would be according to circumstances; by sailing, if feasible, and if not, by warping or towing. The fallacy of the defendant's argument lies in supposing it necessary that the ship should get away to sea, in order to satisfy the warranty. Supposing that in order to save the warranty she was moved into the river at an earlier period than she would otherwise have been, that is no more a fraud on the underwriters than any other previous step taken to provision and load her with all expedition in order to get her ready for sea in the time specified. In *Nelson v. Salvador* the ship never moved from her moorings, whereas the changing her place in the river might enable her, by gaining a distance there, to take advantage of any short period of lull or favourable wind in order to get out, which she could not have done had she remained higher up. [Lord *Lyndhurst* C. B. The captain must have known that from the duration of the tide he could not by the slow process of warping proceed further on the 15th than a quarter of a mile.] He might know that he could not get out that day, but if he took the only mode of beginning his voyage by going as far as he could, then if he bonâ fide intended to go to sea that was sufficient. [*Parke* B. The wish to get to sea, under the circumstances, must have proceeded from the warranty.]

LORD LYNDHURST C. B.—By the terms of the war-

ranty the ship was warranted "not to sail for *British North America* after the 15th of *August* 1831." She broke ground in *Dublin* harbour on the 15th of *August*, and was warped down the river *Liffey* a quarter of a mile, till it was found impossible to go further, on account of the fall of the tide. On the next day she was warped down further, as long as the continuance of the tide permitted. The question turns entirely on the intention of the captain; if at the time of breaking ground and moving the vessel he proceeded down the river with a bonâ fide intention of placing her in a more favourable position from which to prosecute the voyage, that would be a compliance with the warranty; but if, as there is some reason to apprehend, he left the dock and warped his vessel down to the place at which she took the ground, with no other object than merely and solely to comply with the letter of the warranty, that would not be such a sufficient commencement of the voyage as would be a compliance with the warranty. This alternative was a question of fact for the consideration of the jury; but as the facts were not stated to them, no conclusion of fact has been drawn, so that we are not in a situation to decide the question. The case should be sent to a new trial to furnish materials for our judgment. The question will be, Whether the master, on the 15th of *August*, by hauling out of dock and warping down the river, intended to place himself in a more favourable situation for prosecuting his voyage, or merely and solely to comply with the terms of the warranty? If what the captain did was with an intention of placing the vessel in a more favourable situation for proceeding, as well as to comply with the warranty, we think that the warranty was complied with.

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PARKE B.—All was found by the jury which could

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be found under the circumstances, but that is not enough. It must be ascertained whether the moving on the 15th was merely and solely for the purpose of bringing the case within the letter of the warranty.

ALDERSON B.—If the vessel was warped down on the 15th merely and solely for the purpose of bringing it within the warranty, that is not enough; but if what the captain did was from a mixed motive, partly to put himself in a more favourable position to commence his voyage, and partly to comply with the warranty, that is sufficient.

Rule absolute for a new trial (a).

(a) The case having been tried again before Gurney B. the plaintiff had a verdict, with a special finding of all the facts. A writ of error having been afterwards brought, the Court of Exchequer Chamber gave judgment in his favour in *Hilary* vacation 1835. See Vol. V.

WRIGHT and Another, Assignees of JACKSON a bankrupt, against SORSBY, executor of SORSBY.

During a trial a plaintiff's counsel proposed to the defendant's counsel that he should consent to a verdict for 100*l.*, without costs on either side. The defendant's counsel conferred with

THIS was an action for money paid to the use of the testator, which came on for trial before Mr. Justice Taunton at the last summer assizes for *Yorkshire*, the last cause but one on the second list of causes, viz. for the *West Riding*. A verdict was taken for the plaintiffs by consent for 100*l.* without costs.

Addison had obtained a rule to show cause why, on payment of costs, the verdict should not be set aside defendant and his attorney, who were in court, advising them to accept the offer, but both told him it could not be agreed to. However, the defendant's counsel took on himself to consent to a verdict on the terms proposed, and it was entered accordingly. Held, that as neither the attorney nor the defendant opposed the making the order at the time, except in private conference with their own counsel, no new trial could be granted, even on payment of costs, and a rule obtained for that purpose was discharged with costs.

and a new trial had, with a stay of proceedings in the meantime, upon an affidavit of the defendant's attorney, who stated that his special pleader had advised there was a good defence to the action. That on the cause coming on, his counsel told him that the plaintiffs' counsel had proposed to take a verdict for 100*l.* on behalf of his client, each party paying his own costs; to which course the defendant's counsel recommended him, the defendant's attorney, to accede. The affidavit went on to state, that deponent informed his said counsel he should not accede to such proposal, and wished the cause to proceed. Shortly after, while the plaintiffs' counsel was stating plaintiffs' case, the defendant's counsel again urged the deponent to accept the plaintiffs' offer, but deponent, after consulting his client the defendant, who was seated near him, informed his said counsel that he could not accede to the terms proposed. That his said counsel then addressed himself to the defendant, and advised him to agree to the terms of settlement proposed by the plaintiffs' counsel, but the defendant stated that he could not agree to them, as he should be paying more money than he had received. That the defendant's said counsel then observed, "I will take it on myself," or words to that effect, and turning round, informed the plaintiffs' counsel that his proposal was agreed to by the defendant. A verdict by consent for 100*l.* without costs was then taken, and deponent saith that it was so taken without consent, and contrary to the express wishes of the deponent and the said defendant, as mentioned to his said counsel. He also produced an affidavit of merits, and contended that it was positively sworn that the acquiescence of counsel took place without the consent of the parties.

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*Atcherley* Serjt. now showed cause on an affidavit of

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the plaintiffs' attorney, which stated that while the plaintiffs' counsel was opening the plaintiffs' case to the jury, the counsel for the defendant interposed with an offer of a verdict for 60*l.* without costs. That that offer was declined and the speech proceeded, during which a conference took place between the defendant, his counsel and attorney, which ultimately terminated in the address for the plaintiffs being again interrupted by a proposal from the defendant's counsel to permit the plaintiffs to take a verdict by consent for 100*l.* without costs; which terms the plaintiffs' attorney consented to accept, and a verdict was accordingly taken for the plaintiffs. The learned serjeant cited *Mole v. Smith* (a), where Lord Chancellor *Eldon* said, "It is for Mr. *Shadwell* to consider whether he is authorized to give his consent for the widow. If he does, I must act upon it, and she will be bound by it." In *Furnival v. Boyle and others* (b), Lord Chancellor *Lyndhurst* decided that a party is bound by the consent of his counsel given in court, though they had no instructions to consent, if they were at the time apprised of all those facts of which the knowledge was essential to the proper exercise of their discretion; but that he will be relieved from an order made by such consent, if, when his counsel exercised their discretion, they had not those materials before them on which a correct judgment might be formed. There, the solicitor being absent and only his clerk present, the terms offered were only accepted on the counsel who proposed them declaring that if they were not accepted he must forthwith proceed adversely (c). The present case is stronger,

(a) 1 Jac. & W. 673. See *Thomas v. Hewes*, ante.

(b) 4 Russ. 142.

(c) That case leaves it doubtful how far a party will be affected by the remissness of his solicitor in not immediately objecting to an order made by consent of counsel in court, when neither the solicitor nor the suitor were present, and neither had given instructions to consent.

for the defendant was present at the time of the negotiation and when the verdict was taken. He also cited *Filmer v. Delber (a)*. The court then called on

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*Addison* to support his rule. In the cases cited it was left in the discretion of counsel to consent, if they thought it advisable. Here that discretion was excluded by the express protest made on the spot by the attorney and the party himself. The counsel took it on himself to consent to the verdict.

LORD LYNTHURST C. B.—I always thought that a party was bound by the act of his counsel under such circumstances as the present, and decided accordingly in the case brought before me on the other side the hall. In the present case the refusal of the defendant's attorney and his client to consent to their counsel's advice, took place in a private conference among them, and was not communicated to the plaintiffs. If it had, the plaintiffs' counsel might have gone on to obtain a verdict, which would have burdened the defendant with costs. On the contrary, the defendant allowed the verdict to be taken by consent in the terms proposed, and though it may be true that he remonstrated with his own advisers, it would be to the prejudice of the plaintiffs if the terms on which they then consented to a verdict without costs were not now enforced.

PARKE B.—It would have been better that the defendant and his attorney should have opposed their counsel at the time than that it should be done now.

The other barons concurring,

Rule discharged with costs.

(a) 3 Taunt. 486.

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EDWARDS *against* EDWARDS Administratrix with the will annexed of HENRY EDWARDS deceased.

The expenses which executors will be justified in incurring about the funeral of the deceased when his estate turns out insolvent, must be reasonable, according to the circumstances of each particular case, with reference to the testator's condition in life.

Where in an action against the personal representative of the voluntary grantor of an annuity, plene administravit was pleaded, the defendant claimed an expenditure of 103*l.* on the funeral of the deceased, who died worth 2987*l.*, but whose rank in life did not appear.

*Semble*, that that sum

could not be allowed to the personal representative on plene administravit, against a claim for an arrear on the annuity deed.

Nor can items for expenses of reconveying mortgaged premises to the real representative of the mortgagor, and for costs of ejectments brought to recover them, be so allowed. Nor a payment by the personal representative out of the assets on account of interest due on a mortgage created by the father of the deceased before the estate descended to the latter.

**D**EBT on a covenant in an annuity deed, by which the deceased, *H. Edwards*, covenanted for himself &c., in consideration of natural love and affection, to pay the plaintiff (his mother) an annuity of 52*l.* per annum. Breach, that 26*l.*, one half-year's annuity, was in arrear and unpaid. Plea, plene administravit. Replication, that the defendant had assets of the deceased unadministered in her hands at the time of bringing the action. Issue thereon. The cause was tried before *Bosanquet J.* at the last summer assizes for *Carmarthenshire*. The defendant was the widow of the deceased, and representative as well of his real as his personal estate. She admitted assets to the amount of 2987*l.*, but set up various payments to a larger amount as made in her character of administratrix. The following payments were disputed: 103*l.* for funeral expenses and mourning; money paid in discharge of two mortgages, one granted by the deceased, and the other by his father in 1783, before the deceased had possession; an arrear of interest on the old mortgage paid off by the defendant; and lastly, the costs of reconveyances of the mortgaged property to her, and of several ejectments brought to recover the possession.

The learned judge directed a verdict to be found for the plaintiff for 26*l.*, with liberty to the defendant to

move to enter a nonsuit, or reduce the verdict by deducting any items the court should disallow, the court to be at liberty to exercise the same judgment on the facts as a jury might have done. A rule having been accordingly obtained in *Michaelmas* term,

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*E. V. Williams* showed cause. The item of 103*l.* for funeral expenses cannot be allowed to this administratrix; for the rule is, that where the estate is solvent, only a reasonable sum should be expended, and no more than 20*l.* when it is insolvent; *Hancock v. Podmore* (a). In *Stag v. Punter* (b) Lord *Hardwicke* says, "At law where a person dies insolvent, the rule is, that no more shall be allowed for a funeral than is necessary; at first 40*s.*, then 5*l.* (c), and at last 10*l.*, and the law has not been since altered. It must be confessed that he also says, "he thought it a hard rule, as an executor is obliged to bury his testator before he can possibly know whether his assets are sufficient to pay his debts:" and adds, "that a court of equity was not bound by the strict rule; and that where the testator leaves large sums in legacies, that is a reasonable ground for the executor to believe that the estate is solvent, and that in such a case a court of equity would not adhere to the rule of law." The latter rule must however apply at law in all cases, and this court cannot inquire whether the executor, at the time of the funeral, had reasonable ground to suppose the estate to be solvent. The next items claimed are for payments in redemption of two mortgages on the real estate of the deceased, and for reconveying it to the administratrix as the real representative, and for the costs of three ejectments brought by her in the name of the mortgagees to

(a) 1 B. &amp; Adol. 260.

(b) 3 Atk. 119.

(c) See *Smith v. Davies*, Bull's N. P. 143.

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recover the possession. Now on plene administravit an executor can only receive allowance for the payment of debts of higher degree than that claimed by the plaintiff, or of equal degree with it, but paid before action brought by the plaintiff. The expenses of recovering and reconveying the mortgaged property fall within neither of those descriptions. The executor is bound to satisfy a bond held by a mortgagee as a collateral security for the payment of the mortgage money, before paying simple contract debts; but as far as this issue is concerned, his duty stops there for the time. Should indeed the estate arrive at a surplus, the representative of the real estate can compel the representative of the personal estate to exonerate the real estate from the consequences of the mortgage, (viz. the costs of reconveyance, and paying costs of ejectment to recover possession,) as well as from the debt itself. But no surplus can be declared till every claim against the deceased is satisfied. Now as this claim of the plaintiff, though being on a voluntary deed, must be postponed to every simple contract debt of the deceased, it still bound the deceased in his lifetime, and his administratrix after his death; *Cray v. Rooke* (a), *Lechmere v. Carlisle* (b), *Lady Cox's case* (c). Had the testator lived, the reconveyance might have been insisted on by him. It is now attempted to enforce it against his personal estate; but the administratrix, before she paid sums which could only be claimed through the deceased, was bound to pay all that could have been enforced against him. On that principle the item for interest on the old mortgage of 1783, made by the father of the deceased before the latter came into possession, must be disallowed as a mere voluntary payment.

*Chilton* and *J. Evans* supported the rule. The

(a) Cases temp. Talbot, 153. (b) 3 P. Wms. 222. (c) Id. 339.

questions as to the funeral expenses are, whether they were or were not *bonâ fide* incurred by the administratrix, and whether she was not reasonably justified in incurring them by the apparently solvent circumstances of the deceased at the time of his death. Thus *Hancock v. Podmore* does not lay down as a general rule that in the case of an insolvent estate, 20*l.* is the utmost sum to be allowed for funeral expenses, but proceeds on its own particular circumstances, among which one was strongly urged, viz. that the executor must have known the estate to be insolvent. In *Stag v. Punter* Lord *Hardwicke* clearly recognizes the question in equity to be whether the expenditure was such as a cautious and prudent person would incur under the circumstances of apparent solvency in the particular case; 60*l.* was there allowed. As to the expenses of the reconveyance, the administratrix would not be justified in paying the mortgage money without taking a legal acquittance, so as to secure her against repaying it; and the expense of a release is about the same with that of a reconveyance. It was the defendant's duty to recover possession of the mortgaged premises, so that the costs of the ejectment should be allowed. The item paid for interest of the old mortgage debt is claimed from the administratrix as personal representative of the deceased, who would have been liable as executor of his father.

*Cur. adv. vult.*

The judgment of the court was now delivered by

PARKE B.—It appears to me that this rule ought to be discharged, as in any view of the case there will be a surplus sum, to the allowance of which the administratrix will not be entitled; and which will therefore be applicable to the payment of the plaintiff's annuity.

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As to the expenses of the funeral, the law is laid down to be, that only a reasonable sum can be allowed to an executor in the case of an insolvent estate. In *Shelly's* case (a), which occurred previously to those which have been cited, Lord *Holt* said, "that in strictness no funeral expenses are allowable against a creditor except for the coffin, ringing the bell, parson, clerk, and bearers &c., but not for pall or ornaments." In *Stagg v. Punter* (b), Lord *Hardwicke* stated, that "at law where a person dies insolvent, the rule is, that no more shall be allowed for a funeral than is necessary, at first only 40s., then 5l., then 10l." But in the later case of *Hancock v. Podmore* (c) as much as 20l. was allowed. The court there did not lay it down as a rule that even that sum should be the limit of the allowance where the estate was insolvent, but that it was the proper limit under the circumstances of that case. The duty of an executor is to incur such reasonable expenses only as are suitable to his testator's condition in life; if he goes beyond that limit, he must take his chance of losing his reimbursement, should the estate prove insufficient to satisfy the creditors. In this particular case the court does not mean to lay down that 20l. only would be allowed for funeral expenses; for the sum to be so allowed may be more or less, according to what was strictly necessary under the circumstances, though 103l. seems too much.

However it is unnecessary to decide this point, for whether we should allow 20l., 30l., 40l. or 50l. for that item, there would still be a surplus in this case for other items which cannot be allowed to the administratrix, and which are more than sufficient in amount to satisfy the plaintiff's claim, and entitle him to retain a verdict for 26l.

(a) 1 Salk. 296. See *Greenside v. Benson*, 3 Atk. 249.

(b) 3 Atk. 119.

(c) 1 B. & Adol. 260.

The next items claimed by the administratrix to be allowed in her accounts against the creditors, are payments by her for the costs of reconveyances and of ejectments brought to recover possession of the mortgaged property. I am of opinion that these payments must be disallowed, and that an executor is not entitled to reckon them as payments valid against the creditors of his testator, though he might do so against the heir or residuary legatee, if made out of the surplus, should any ultimately exist after satisfying all outstanding demands against the deceased. These are not payments to the creditors of the estate; they have a right to have disposition made by the executor of the personal estate as against the real representatives, the latter having only an equity to have the real estate exonerated of that mortgage out of any surplus personalty which might remain after paying all the testator's just debts. But while any outstanding debts or engagements exist, the executor is not bound in equity to pay over the apparent surplus in exoneration of the real estate, till some provision is made for liquidating those debts at a future period; *e. g.* in this instance by setting apart a sum sufficient to satisfy the growing payments of the annuity. If no real surplus of personalty should ultimately exist, the real representative could not claim exoneration of the real estate. The next item claimed was a payment out of the testator's assets for interest due from his father on the old mortgage; but inasmuch as it is not proved that any of the father's assets came to the deceased, but, on the contrary, it appears that all the assets were proved to belong to the deceased himself, that payment cannot be allowed; for the executor can only claim an allowance for paying the debts of the deceased. As it turns out that, without taking into account the sum claimed for funeral expenses, the amount of the items disallowed is

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such as to entitle the plaintiff to retain the verdict for 20*l.*, it is not now necessary to decide the exact sum to be allowed for them.

**BOLLAND B.**—With regard to the sum which ought to be charged for funeral expenses, we are not obliged to lay down any rule or fix any sum by which executors must be governed in every case of this kind. *Hancock v. Podmore* lays down no rule, and is inconsistent with the earlier cases which fix particular sums. It is clear that even the larger sums allowed by them are too low for modern exigencies in many stations of life: but we are not here called on to fix the minimum of allowance to personal representatives.

**ALDERSON B.**—It is not necessary in this case to say whether 20*l.* is a sufficient and reasonable sum to be allowed to the executors for funeral expenses in the instance of an insolvent estate. The sum to be allowed in each case should be that which was strictly necessary for the particular funeral; a sum which must vary in every instance according to the particular locality where it takes place, and the price of the requisite articles there at that time. I concur with my brother *Parke* on the other points.

Rule discharged.

See *Bissett v. Antrobus*, 4 Sim. R. 512.

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HARRIS and Another, Executors of the will of WILSON deceased, *against* OSBOURN.

**THIS** was an action of debt brought by the plaintiffs as the executor and executrix of one *Thomas Wilson* deceased, to recover the sum of 154*l.* 17*s.* 6*d.*, the amount of the testator's bill for business done by him for the defendant as his attorney. The defendant pleaded the general issue and the statute of limitations; on which pleas issues were joined. The particulars of the plaintiffs' demand (consisting of an attorney's bill) had been delivered to the defendant under a judge's order, and by agreement between the parties formed part of the case to be referred to by either party. Under the power given by the 3 & 4 Will. 4. c. 42. s. 25., the plaintiffs and defendant agreed upon the following statement for the opinion of the court:—The business charged for in the particulars of the plaintiffs' demand was done by the testator for the defendant according to the dates in the particulars, and the disbursements of money charged for in the same particulars were made by the testator for the defendant as set forth in the particulars. The items in the said bill of particulars are for charges in respect of one and the same cause, which, during all the time therein mentioned, was in progress in the manner therein specified. The defendant has paid into court in this action a sufficient sum to cover all that part of the plaintiffs' demand which was contracted within six years before the commencement of this action.

The contract of an attorney or solicitor retained to conduct or defend a suit is entire and continuing, viz. to carry it on till its termination, and can only be determined by the attorney upon reasonable notice. So that in an action by an attorney for business done in a suit more than six years before the commencement of the action, the statute of limitations 21 Jac. 1. c. 16. s. 3. is no bar when no such notice was given, and the suit did not terminate till within six years before the action was brought.

The question for the opinion of the court is, whether the statute of limitations which the defendant has pleaded be a sufficient bar to the plaintiffs' recovery of the residue of their demand or not? If it be, judgment

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is to be entered for the defendant on a *nolle prosequi*; if it be not, judgment is to be entered for the plaintiffs by confession for such sum as any two clerks in court in Chancery, one of them to be selected by each party, shall, upon taxation, find to be due to the plaintiffs in respect to the before-mentioned bill of costs and particulars.

*R. V. Richards* for the plaintiffs. The question is, whether, when debts are incurred to a solicitor in the progress of a suit from the client who retained him, the former must sue at each step, or commence an action for his bill just before the expiration of six years; or whether he may, at the final termination of the suit, recover the total amount of his bill, though some of the items were incurred above six years before. It is submitted, that not only is a professional man not so bound, but that he is not entitled to sue for his charges before the expiration of the suit, unless he has withdrawn his services on reasonable notice. Late decisions have established, that if he is not furnished by his client with necessary funds he may abandon the cause, and afterwards recover for his services during the period he was employed; *Vansandau v. Browne* (a), *Rosson v. Earle* (b), though formerly it was held otherwise, *Mordcaui v. Solomon* (c). But he must give timely and reasonable notice to his client of his intention so to withdraw on that account before he can so sue, for the contract between them could not otherwise be determined, it being in its nature entire, and continuing till due notice given by either party. Thus in *Hoby v. Buitt* (d), where on the day but one before an assize,

(a) 9 Bing. 402.

(b) 1 Moody &amp; M. 638.

(c) Sayer's R. 172. See per Lord Eldon in *Cranwell v. Byron*, 14 Ves. 272. And see 1 Sid. 31.

(d) 3 B. &amp; Adol. 350.


for which notice of trial was given, the attorney abandoned the cause without giving his client previous notice of his intention, it was held that the client was entitled to recover against the attorney for damages to which he had been subjected by his default to act on his retainer, by instructing counsel to defend the cause. The contract of the attorney with his client for conducting a suit, nearly resembled one for building a ship or a house &c., for which no action lies before its completion, till it was held that an attorney, on due notice given, might rescind it for want of funds furnished him by his client. But it would be highly mischievous to hold that without waiting for some termination of the cause, he might sue for every act done by him in the course of it. [Lord *Lyndhurst* C. B. While I sat in the court of Chancery I heard a motion in a suit commenced in the time of Lord *Hardwicke*, and which was above a century old. How could it be expected that any solicitor or succession of solicitors could carry on a suit of such duration without receiving advances from the various suitors to cover the necessary disbursements ?]

*Kelly* for the defendant. The contract of an attorney or solicitor is not in its nature single and indivisible for carrying on the suit to its termination, but is an undertaking to perform certain professional services while he remains such attorney or solicitor. The right to sue for them accrues from time to time as they are executed. [Lord *Lyndhurst* C. B. Did you ever know an instance of an action brought by an attorney for his services in a cause, while it was still pending and conducted by him as the attorney ?] No case expressly decides that such an action would not lie; and *Vansandau v. Browne* shows that an attorney may recover his costs before the suit is terminated on giving reasonable notice of abandoning it.

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In that case *Tindal* C. J. reviews the cases which have been cited, and thus notices the objection that an attorney cannot sue for his bill till the business which he has been retained in is terminated: "It would be long before I should be induced to assent to such a proposition. Suppose the employer to become insolvent while the attorney is engaged in a long and difficult suit, it would be hard if he could not recede—resile—from such an engagement." The chief justice, in considering Lord *Eldon's* judgment in *Cresswell v. Byron* (a), coincides with the opinion intimated by that learned person, that an attorney cannot retain his lien on a client's papers after he has ceased to conduct the cause; his right to sue for past services, after notice given, stands on a widely different footing. The sudden abandonment of a cause by an attorney is a good defence to an action by him for his previous services, not because the contract is a continuing one to carry the cause through to a termination, but because on such abandonment his services become of no value. Even if reasonable notice is necessary to the maintaining an action, it is not part of the cause or right of action. That remains notwithstanding such notice is not given; for the neglect to deliver a signed bill, as directed by 2 *Geo. 2. c. 23*, till the six years were nearly expired, would not prevent the attorney from commencing an action so as to prevent the operation of the statute of limitations. No authority can be cited to show that the contract to be implied from these circumstances is entire till the suit is determined. It is said that it is only defeasible where the client does not supply the requisite funds, but it must also cease at the death of the attorney, and his representatives must then be entitled to recover pro rata for his past services. The inconvenience of loss of

(a) 14 Ves. 271.

receipts, against which the statute was intended to guard, will arise where payments take place on account in the course of suits which last many years.

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*Richards* in reply. The decision in *Hoby v. Baill* could not have taken place had it not been considered that the attorney's contract, instead of being divisible at the taking each step is continuing, and binds him to complete the business, unless determined by reasonable notice.

**LORD LYNDDHURST, C. B.**—Were we to accede to the argument for the defendant, one consequence would be, that clients would be obliged to pay off their attorney's bills at particular periods, instead of being able to satisfy them by making advances on account. But I consider that when an attorney is retained to prosecute or defend a cause, a retainer is implied for the whole cause, and a special contract arises to carry it on to its termination. That contract cannot be put an end to without reasonable notice. It is unnecessary here to decide what notice would have been required in this case, as none of any kind appears to have been given. I therefore consider the contract to have been continuing, and to have remained entire, so that the statute of limitations does not apply in bar of the action.

**PARKER B.**—I am of the same opinion. I have entertained considerable doubt on this question during the progress of the argument; but on consideration I think that the decisions on the subject may be explained on one or other of the two following grounds: either on the supposition that the attorney's contract is special to carry the suit through to its termination, but defeasible on notice, or that it is a general contract, and

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to be treated as such. My doubts were, under which of these descriptions the present case must be classed; but I now acquiesce in the doctrine that this was an entire contract to carry on the suit to an end, though defeasible as above stated. It was anciently held to be an entire contract of which the attorney could not by any means divest himself; but the greater length of suits in modern times, with their very increased expenses, have occasioned the decisions that the attorney may determine such a contract on reasonable notice given. I am therefore of opinion, that as no such notice was here given, the contract continued entire. Then the statute of limitations does not operate as a bar. None of the cases are irreconcilable with that doctrine, and I acquiesce in the opinion of my brothers.

BOLLAND and ALDERSON Bs. concurred.

Judgment for the plaintiff.

#### DICKENSON *against* TEAGUE.

A plea of the statute of limitations stated that the cause of action did not accrue within six years next before the commencement of the suit. Plaintiff replied,

that the cause of action did accrue within the six years, &c. :—Held, that without specially replying process issued, the plaintiff might on the above replication prove a *quo minus* to have issued within the six years, and produce the roll to show the continuances regularly entered up accordingly.

If continuances are regularly entered upon the roll, the court will not look at any thing in order to contradict the roll, *e. g.* a writ produced to show that a second writ, an *alias*, was tested on a day subsequent to the return day of the first.

The cases enumerated by 3 & 4 Ann. c. 9. s. 1. in which promissory notes signed by an agent cannot be assigned, are instances only.

**A**SSUMPSIT by indorsee against the payee and indorser of a bill dated 20th *March* 1826, payable two months after date, viz. on 23d *May* 1826. Other counts treated the instrument as a promissory note drawn by an agent of the *Devon and Cornwall* mining company on that company, and accepted for them by *W.* another agent of the company. Pleas: non as-

sumpsit; and secondly, that the causes of action did not accrue within six years next before the commencement of the suit. Replication to that plea, that the causes of action did accrue within six years next before the commencement of the suit. At the trial before Bolland B. at the London sittings after last Michaelmas term, the four following writs were produced, and proved to have issued. First, a writ of *quo minus*, tested 21st May 1832, issued within six years from the time when the cause of action accrued, returnable on 20th May, the first day of Trinity term. The second writ was an *alias quo minus* tested the last day of the same term, viz. 16th June 1832, returnable on the first day of the then next Michaelmas term. The third writ was tested the first day of Michaelmas term, returnable the first day of the next Hilary term. The fourth was tested on the last-named day, and returnable 21st January 1832, and to that the defendant appeared. The plaintiff also produced the roll on which continuances had been regularly entered up down to the defendant's appearance. The declaration was of Hilary term 1833, 3 Will. 4. Crowder for the defendant applied for a nonsuit, on the ground that the second writ being tested on a day after the return day of the first, (though in the same term) was not connected with the first, which was not regularly continued down so as to support the declaration. He cited *Taylor v. Gregory* (a) to show that under such circumstances the statute of limitations was not, upon this replication, barred by the issuing of the first writ. This objection was overruled by Bolland B., who however gave leave to the defendant to move to enter a nonsuit, and the plaintiff had a verdict.

Accordingly in Hilary term Crowder moved to enter

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(a) 2 B. & Adol. 257.

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a nonsuit, stating the above facts. [*Bayley B.* The second writ, tested on 16th *June*, being an alias writ, must have had a preceding writ. The case cited shows that the teste of the second writ might therefore be amended on a cross motion by inserting 26th *May* instead of 16th *June*.] Secondly, this instrument is improperly declared on as a bill, for, being drawn and accepted by or on behalf of the same persons (*a*), it is in legal effect a promissory note. In *Robinson v. Bland* (*b*), where it was held that a man was liable for a bill drawn on himself, this point was not taken. [Lord *Lyndhurst C. B.* Suppose an action by an indorsee against an indorser of a bill drawn by *Evans* on and accepted by himself, could those facts afford any defence? The effect of a man's drawing a bill on himself in the general form is rather to produce a promissory note, and might be so treated; but as against the party who indorsed it to the holder, it may be treated as the instrument it appears to be, or he would be burdened with proof of the legal effect.] If a tenant for life grant his estate to him in reversion, that must be pleaded according to its legal effect, viz. as a surrender and not as a grant; *Moore v. Lord Plymouth* (*c*), cited in *Stephen on Pleading*, Ch. II. S. v. Rule vi. [Lord *Lyndhurst C. B.* That is because the legal effect of the instrument is apparent on the face of it and known to the grantee. How can that apply to a party taking a bill of exchange or an instrument represented to be such by the indorser? *Bayley B.* The payee has here indorsed the bill as if the legal obligation was what it purports on the face of it to be. The holder cannot tell that an instrument looking like a bill of exchange is a promissory note because it turns

(a) This point also was made at the trial and reserved for the court.

(b) Burr. 1077.

(c) 3 B. & Ald. 66.

out to be in fact drawn and accepted by the same person. That would throw the onus of proof on the plaintiff.] Thirdly, if this is a promissory note, then, being drawn by an agent, it is not assignable within stat. 3 & 4 Ann. c. 9. s. 1., the company not being a "corporation" or "traders" within that act; *Dickenson v. Valpy* (a). [Lord Lyndhurst C. B. The cases put in the act are instances only. If I authorize a person to draw a bill in my name I am liable on it. *Bayley* B. The point decided in *Dickenson v. Valpy* was different. Here we are to consider whether a mining company was such a business as would impliedly confer authority on one partner to bind another.] Rule granted to enter a nonsuit on first point only.

A cross rule was afterwards obtained by the plaintiff for amending the second writ in the manner pointed out by *Bayley* B., and making it conformable to the roll, if necessary.

*D. Pollock, Kelly and J. Wilson* showed cause against the first rule, and supported the second. The roll removes all objections, for it is right from beginning to end; and the process appears on it to be regularly continued down to the defendant's appearance. The defect, if any, is on the writ only, and cannot affect the roll.

*Per Curiam*.—If the roll is right we cannot look at anything else, or allow it to be contradicted. They then called on

*Crowder and Follett* to support the rule. Under this replication the plaintiff could not give evidence of process sued out within the time, or of the entry of continuances on the roll, the quo minus not having

(a) 10 B. & Cr. 128.

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been replied specially. [*Parke B.* after conferring with *Bolland B.* It does not appear that this objection was distinctly taken at the trial. It should have been so taken, for the plaintiff might then have given evidence of an acknowledgment of debt made within the six years. It is clear that under a general replication to a plea that the cause of action arose within six years from the exhibiting of the bill, the plaintiff was bound to reply the process, and could not otherwise give evidence of its having been sued out before the exhibiting the bill. If without doing that, he only took issue on the plea, the only question would be, whether there has been a promise or cause of action within the time. But it makes all the difference in this case that the plea alleges that the cause of action did not accrue within six years next before the commencement of the suit; for if the defendant choose to plead in that form, it appears from *Beardmore v. Rattenbury* (a), that the plaintiff may reply generally and prove the writ, which is the commencement of the suit. The cross motion seems to me unnecessary.] *Beardmore v. Rattenbury* was the case of an original writ. [*Parke B.* assented.] When the defendant speaks of the "commencement of the suit," it must be taken to mean the usual commencement in point of law. That was *prima facie* the "exhibiting the bill." The replication should show that the process is intended to be treated as the commencement, and what process it is. Now here the first writ is not connected with the present action. Does not section 10 of the uniformity of process act (which passed 23d May 1852,) apply to the process subsequent to that date?

**PARKE B.**—The general rule before the late statute for the uniformity of process, 2 *Will. 4. c. 89.* was, that

(a) The report in 1 D. & R. 27, sets forth the plea. See also 5 B. & Ald. 452.

the plaintiff might elect whether he would treat the filing or exhibiting the bill, or the suing out the writ, as the "commencement" of his suit (a). If he elected to rely on the process as the beginning of his action, then, if the defendant pleaded that the action did not accrue within six years *from the time of exhibiting the bill*, the plaintiff was bound to state the process in his replication; but if the defendant pleaded generally that the action did not accrue within six years *from the commencement of the suit*, the plaintiff could not properly reply to the process, but might reply generally, taking issue on the words of the plea, and giving the process in evidence to show what was the true commencement of the suit. The plaintiff had a right on this replication to insist on the quo minus being the "commencement" of the suit; though it would have been different had the plea been "before the exhibiting of the bill." The rule for the nonsuit must therefore be discharged. The rule for amending the writ being unnecessary, must also be discharged, and with costs.

On the other point we can only look to the record, and must take it to be true without suffering it to be disproved or contradicted. The uniformity of process act does not apply to process issued before it passed.

BOLLAND, ALDERSON, and GURNEY Bs. concurring,

Rules discharged accordingly (b).

(a) See 15 East, 377.

(b) Since 2 Will. 4. c. 89. the writ of summons or capias is the commencement of every personal action; *Alton v. Undershill*, ante, Vol. III, 427; *Thompson v. Dicus*, id. 873.

See *Braithwaite v. Lord Montford*, ante, 276.

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PORTER *against* COOPER.

An indictment, prosecuted by the plaintiff against the defendant, for a nuisance, having been returned a true bill at one quarter sessions, was traversed to the next. The defendant was not prepared to plead at that period of the second sessions at which by the practice he was bound to do; upon which the counsel for the prosecutor said, he should press for judgment for want of a plea, unless the defendant would pay the costs of the day. The court said the defendant must either

**A**SSUMPSIT. The plaintiff had indicted the defendant for a nuisance at the *April* quarter sessions for the county of *Worcester*, in 1832. The defendant proposed to plead to the jurisdiction of the court, but not being prepared so to plead, or to defend at the *July* quarter sessions, the following memorandum was indorsed by the counsel on each side, on their briefs, and signed by them:—"Traversed to the next sessions by consent, the defendant paying the costs of the day, including counsels' fees, the prosecutor giving a copy of the replication one month before the next sessions." There were six special counts on this memorandum, and a seventh on an account stated. Plea: general issue. At the trial before *Patteson J.* at the last *Lent* assizes for *Worcestershire*, the above facts appeared. The original indictment was produced by the clerk of the peace in support of the special counts, indorsed "a true bill;" but it being objected on the authority of *Rex v. Smith (a)*, that it was not admissible to prove an indictment preferred and found at the sessions, without a caption formally drawn up of record, the learned judge assented to

(a) 8 B. &amp; Cr. 341.

plead and take his trial, or might traverse on the terms proposed by the prosecutor. The parties having come to an agreement, their counsel signed the following memorandum, indorsed on their briefs: "Traversed to the next sessions by consent, the defendant paying the costs of the day, including counsel's fees, the prosecutor giving a copy of the replication a month before the sessions." The costs were afterwards taxed by the clerk of the peace, and the allocator served on the defendant. When applied to for the amount, he objected to two items, which were relinquished on behalf of the prosecutor. The defendant's attorney offered at that time to give his check for the residue, but did not, it not being pressed for. On a subsequent application for payment, defendant desired prosecutor's attorney to "apply to Mr. B. who received his rents, and he would arrange or pay." Held, that the arrangement between the parties at the sessions bound the defendant, as an agreement, independently of that subsequent order of the court which sanctioned it; and therefore that the agreement taken together with the promise to arrange and pay, after ascertaining the amount, afforded evidence for a jury of an account stated.

the objection, and the special counts were abandoned. The evidence in support of the count on an account stated, embraced the facts above stated. It was also shown that in the afternoon of the second day of the *July* sessions, the counsel for the prosecution insisted, that by the practice of the sessions the defendant ought to have filed his plea on the morning of that day, and that he should press for judgment as for want of a plea, unless the defendant would pay the prosecutor his costs of the day. The court of quarter sessions decided that the defendant must plead and try forthwith, or that he might traverse to the next sessions, on payment of the costs of the day. The defendant being then presiding as chairman at the trial of prisoners in another court, his attorney went thither, and having consulted him on the subject returned, and having assented to traverse on the above terms, the memorandum declared on was signed as before mentioned. The following entry was afterwards made in the book of the sessions: "*Rex v. T. B. Cooper and T. Evans. On the motion of A. B. counsel on the part of T. B. Cooper and T. Evans, against whom an indictment was preferred at the last Easter sessions for a nuisance, and with the consent of C. D. counsel on the part of the prosecutor, it is ordered, that the trial of the said indictment be, and the same is hereby postponed until the next Michaelmas general quarter sessions, on payment by the said T. B. Cooper and T. Evans of the costs of the day, to be taxed by the deputy clerk of the peace; and it is further ordered, that the prosecutor do deliver to the defendants or their attorney, a copy of the replication, at least one month previous to the next general quarter sessions.*" The deputy clerk of the peace taxed the prosecutor's costs of the day at 43*l.* 8*s.* A copy of the bill and allocatur was sent to the defendant's attorney previous to the *Michaelmas* sessions, and payment

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requested, but he replied that the defendant proposed to take the opinion of the court at the next sessions, as to the costs, about which there was some mistake. When the indictment was called on, the prosecutor's counsel requested to know what objection there was to paying the costs; to which it was answered, that 1*l.* 9*s.* too much had been allowed. It was proposed to refer the bill back to the deputy clerk of the peace; but on the prosecutor's attorney consenting to disallow the above items, the defendant's attorney publicly promised to give his check for the balance before he left the town. Not being pressed for, it was not given, and he afterwards refused to give it. The defendant and the prosecutor's attorney having conversed together on 23d November 1832, the former desired the latter to apply to his, the defendant's attorney, who received his rents, "and he would arrange or pay;" but on application made accordingly to that gentleman, he refused to pay. The defendant's counsel contended, that these facts were not evidence for the jury on the account stated, but *Patteson J.* overruled that objection, giving leave to move to enter a nonsuit. He then summed up the case to the jury, who found a verdict for the plaintiff for 41*l.* 15*s.* on the account stated. *Maule* afterwards moved according to the leave reserved, on the ground that there was no evidence of any sum due from the defendant to the plaintiff, which could be recovered on the counts for an account stated; and *Emerson v. Lashley* (a), *Fry v. Malcolm* (b), *Carpenter v. Thornton* (c), *Smith v. Whalley* (d), were cited. [Lord *Lyndhurst C. B.* No action could have been maintained except on an express promise.] A rule having been granted,

(a) 2 H. Bla. 248.

(b) 4 Taunt. 705.

(c) 3 B. & Ald. 52.

(d) 2 B. & P. 484.

*Talfourd* Serjt. *R. V. Richards* and *G. T. White* showed cause. In *Emerson v. Lashley* it was held, that no action would lie to recover costs ordered to be paid by an interlocutory rule of the mayor's court; but that decision cannot apply in the present case, the plaintiff and defendant having, through the medium of their counsel, previously entered into an agreement, to which this order of quarter sessions was merely ancillary and conformable, without proceeding from the breast of the court, as in *Emerson v. Lashley*. The following terms indorsed by the counsel on their briefs, and mutually signed by them, "traversed to the next sessions by consent, the defendant paying the costs of the day," constitute a distinct agreement by the defendant for paying those costs, in consideration of the forbearance exercised by the plaintiff, in consenting to a traverse to the next, viz. the third sessions. The consent of the counsel appearing on the briefs, was evidence of that agreement, from whatever source the consent proceeded. Then an action was maintainable on it, whether the quarter sessions made an order in conformity with it or not, and whether that order could or could not be enforced otherwise than by attachment. In *Wentworth v. Bullen* (a), Mr. Justice *James Parks* said, "Now though there is no remedy for disobedience of a judge's order, as such, by one of the parties against another by action, but by attachment merely, yet if it be made by consent of both, and is founded on a binding agreement, an action will not the less lie upon that agreement, though it have also the additional sanction of a judge's order. The contract of the parties is not less a contract and subject to the incidents of a contract, because there is superadded the command of the judge. The case of an agreement to refer by order of a judge is a familiar instance, many

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actions being brought on such agreements. The defendant's agreement in this case was to pay the plaintiff his costs of the day, on good consideration. Then *Riley v. Byrne* (a) applies to show that the allocatur by the deputy clerk of the peace operates as an award. In that case, notice of trial had been given, after which the cause was compromised, on the defendant's agreeing to apologize and pay the plaintiff his costs as between attorney and client. The defendant made an apology, which was accepted. By a subsequent rule of court payment was ordered of 67l. 13s. costs of the action, and of 7l. 13s. costs of applying for the rule. It was held that the undertaking entered into by the defendant was such as to constitute a debt provable under the commission; that the defendant having agreed upon good consideration to pay what should be found due for the plaintiff's costs, the master's allocatur operated as an award. The decision in *Jacobs v. Phillips* (b) turned on the point that the order being *in invitum*, without consent of parties, nothing existed from which an agreement in favour of the plaintiff could be inferred.

Secondly, assuming nothing to be due to the plaintiff on the defendant's agreement indorsed on the briefs, and declared on in the special counts, the facts afford sufficient evidence of a subsequent account stated between the parties, so as to maintain the last count, whether a cause of action previous to that accounting, and independent of it, could be proved or not. The weight of evidence necessary to maintain such a count may be estimated from that admitted in *Knowles and Others v. Michel and Others* (c). In that case, the defendant, after he had felled and taken away certain trees of the plaintiff, had verbally ad-

(a) 2 Br. & Adol. 779.

(b) See post, p. 652.

(c) 15 East, 249.

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mitted that he had agreed to pay a certain sum for them whilst standing; that admission was held sufficient to support an action on an account stated. Again in *Reacock, Administrator, v. Harris* (a), it was held, that the act of accounting with a plaintiff as collector of the tolls of a turnpike, he having assumed that character without legal appointment, but by consent of the parties concerned, was such a recognition by the defendant of the plaintiff's title as estopped it from being disputed, in an action against the defendant on an account stated, to recover tolls with which he had been debited for passing through the gate. Here the facts proved demonstrate that the defendant having objected to two items in the allocatur, the plaintiff resigned any claim upon them; upon which the defendant's attorney promised to give his check for the residue. That ascertains the precise amount which was admitted by the defendant on the accounting to be due to the plaintiff. The party need not go into the consideration of his debt; for even when under a plea of the statute of limitations, no item appeared within six years, but the parties had met and settled an account, though without writing, it was said to be a new cause of action; *Highmore v. Primrose* (b), *Knowles v. Michel* (c). [Parke B. Is this a sum of money in which the defendant could be said to be originally indebted to the plaintiff?] The defendant cannot go into the original cause of action, for if he has made a contract which is not alleged, he is bound by his promise; *Elworthy v. Bird* (d). Here, he contracted to pay the costs if the trial was postponed. By stating an account with a person, the defendant may recognize a title in him which will enable him to maintain an action on the

(a) 10 East, 104.

(b) 5 M. &amp; S. 65.

(c) 13 East, 242.

(d) 13 Pri. 222, 2 Sim. &amp; Staunf. 280.

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account stated, though he could not have sued on the original contract; *Peacock v. Harris* (a).

A nonsuit cannot be entered, for the original indictment found at the sessions was improperly rejected in evidence. *Rex v. Smith* does not apply. The court intimated that they would hear the arguments in support of the rule; and that if they prevailed against those which had been urged, the plaintiff's counsel should be heard on the point last raised.

*Maule and Curwood* contra. This action is not maintainable at all, either on the special counts or the account stated. Here was no agreement to pay a certain sum for costs, or to pay the costs to be afterwards ascertained. For the result of the evidence is, that the parties appearing in court by their counsel, an arrangement was consented to between them, to adjourn the hearing on certain conditions. But that arrangement could only be carried into effect by sanction of the court; their order being as necessary to perfect the arrangement of the parties, as the consent of the latter was to making the order by the court. The agreement by the counsel representing the parties, was only to postpone the trial. If that could be sued upon, the action would be for not consenting to the officer drawing up the order of the court, embodying the above terms. [*Parke* B. The meaning of *Wentworth v. Bullen* was, that the remedy is not confined to actions on agreements entered in under stat. 9 & 10 W. 3. c. 15. s. 1., but extends to orders of reference drawn up independently of that statute. The argument now raised would apply if the contract were only to adjourn the trial, but it has been contended to have been for payment of the money by the defendant

(a) 10 East, 104.

in consideration that the plaintiff would forego his right of insisting on a trial at the then sitting quarter sessions, and postponing it to the next. Cases were cited to show that this was an agreement to pay the costs of the day secured by this order.] The indentment of counsel was merely an instruction to the officer to draw up the order, and ancillary to it, if the agreement was only that the parties should put themselves in a situation to be bound by a rule of the court of quarter sessions. [Parke B. The only question is, whether there was evidence to go to a jury, on the count stating an account stated. If there was, the meaning of the word "arrange" being equivocal, the sense in which it was used was for their decision.] It is submitted, that the facts proved afford no evidence to go to the jury; for the defendant merely referred to his attorney to see whether he would arrange, or pay. [Parke B. His attorney was mentioned as the person who received his rents.] Perhaps these expressions of the defendant would have been sufficient evidence if it appeared that an action was originally maintainable. But the agreement on the other side is, that even before these expressions of the defendant, the action could not be supported. Those expressions are sufficient to enable the plaintiff to recover on an account stated. But it would be dangerous to hold that a mere statement by the defendant of the amount in dispute should confer a right of action, where there was no ground on which it could have been previously supported. No such position as that contended for is established by *Knowles v. Michell* or *Peacock v. Harris*. [Parke B. It comes to this, whether an action could be sustained on this agreement, when executed, to recover the costs? It is not contended that the party could sue if there was simply an order of court, without an agreement. There would be difficulty in sustaining

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the last count, [if the original demand could only be enforced by attachment.]

**PARKE B.**—I think this rule ought to be discharged, and that there was evidence for a jury in support of the count on the account stated. I agree with what my brother Alderton has said during the argument, that in the later cases the courts have deviated very far from the meaning formerly ascribed to an account stated. The present rule I take to be this, that if a fixed and certain sum is admitted to be due to a plaintiff, for which an action would lie, that will be evidence for a jury in support of a count on an account stated. Here was a conditional admission by the defendant of an amount previously due, for only two of the items allowed on taxation by the deputy clerk of the peace were objected to by the defendant, and were given up by the plaintiff without sending them to a proposed new taxation. The allocatur had made the defendant aware of the amount taxed by the quarter sessions, and claimed by the plaintiff; so that when being subsequently applied to to pay, he said, "Go to Mr. Boule who receives my rents, and he will arrange or pay." The meaning of those expressions was clearly for the jury to consider and to decide on whether they did not amount to an admission of liability under the agreement, and a promise to pay the sum so due.

That brings us to the question, whether an action was originally maintainable in this case, as on an agreement? If there was merely an interlocutory order of sessions, I should have been of opinion that it would not. To make out that it would, an agreement between the parties must be shown. That here depends on what occurred at the sessions, and it seems to me that what did take place there, would have amounted to an agreement between the parties independently of the

order of court. The defendant was bound to plead at the second sessions, but was not ready with his plea. The prosecutor's counsel stated in court to the effect that he should then press for judgment for want of a plea, (that is, that he would not forego his right to try at that sessions,) unless the defendant would pay the prosecutor his costs of the day. The court seems to have intimated, that if the parties did not come to terms, they would enforce the right of the prosecutor. Upon this, a negotiation took place, which ended in an agreement, amounting to this, that in consideration that the prosecutor would forego his right to insist on the defendant's pleading immediately, the defendant promised to pay the prosecutor his costs. That appears to me to be a binding contract, wholly independent of the order of sessions; then an action might be maintained on it, and this rule must be discharged.

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BOLLAND B.—Had no agreement existed, so that the case depended wholly on the order of sessions, I should have been of a different opinion. But there was evidence of a distinct agreement, and the defendant being aware of the sum claimed, referred the plaintiff to his attorney, saying "he would arrange or pay." The meaning of those words was for the jury, and I think they have assigned them the fair construction. The plaintiff is therefore entitled to retain his verdict on the count on an account stated.

ALDERSON B.—I am of the same opinion. The more recent cases have certainly established, that a count on an account stated will be supported by evidence that the defendant admitted a certain sum to be due in respect of a demand for which an action would lie. Then was there such a demand in this case? It is said, that no action can be supported on an interlo-

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cutory order of a court. But what the court of quarter sessions did in this case amounts to no more, than intimating that they would not object to any arrangement made by agreement between the parties. The arrangement made was entered into by virtue of the agreement and consent of the parties. All depends on that agreement, though its terms were afterwards sanctioned and assented to by the court. The sum to be paid for costs was afterwards ascertained, and being made known to the defendant, was spoken of by him in terms affording evidence of his promise to pay. I concur, therefore, in opinion that on these facts the count on the account stated was supported.

GURNEY B. concurred.

Rule discharged.

### MESTAYER *against* BIGGS.

The condition of a money bond was for payment to the plaintiff of an annuity of 150*l.* by quarterly payments, after previously reciting that the obligee had contracted with the


**D**EBT on a bond, dated 10th *October* 1826, in the penal sum of 2000*l.*, conditioned for paying to the plaintiff an annuity of 150*l.* by quarterly payments. The breach laid was, that previous to the action several quarterly payments were due and in arrear. Plea: non est factum. At the trial the plaintiff had a verdict, subject to two points reserved, on which the defendant had leave to move to enter a nonsuit; first, obligor for sale to him of a messuage, &c., in consideration, among other things, of the annuity; and further, that on the contract of purchase of the messuage, it was agreed that for the better securing payment of the said annuity, the obligor should execute that bond:—Held, that the bond was properly stamped with a 1*l.* 1*s.* 6*d.* stamp within 55 G. 3. c. 184.

Held also, that the want of enrolment under 53 G. 3. c. 141. the annuity act, could not be raised as an objection upon non est factum; and that if it could, it would not prevail, as enrolment was not required under that act, the consideration not being pecuniary.

that the bond should have been inrolled according to the annuity act 53 Geo. 3. c. 141. s. 2.; and secondly, that the deed stamp of 1*l*. 15*s*. was insufficient. The condition of the bond recited as follows: Whereas the above-named *Mary Mestayer* lately contracted with the above-bounden *J. Biggs*, for the sale to him the said *J. B.* of a messuage &c. in consideration of, among other things, an annuity or clear yearly sum of 150*l*. to be paid to her the said *M. M.* during the term of the natural life of the said *M. M.* by the said *J. B.*, his executors or administrators, at and by four equal quarterly payments in the year, as hereinafter expressed: And whereas, on the contract of the said purchase, it was agreed, that for the better securing the payment of the said annuity of 150*l*., the said *J. B.* should execute the above-written bond or obligation, conditioned as hereinafter mentioned. Now, the condition of the above-written obligation is such, that if the above-bounden *J. B.* his heirs, executors and administrators, or any or either of them, do and shall well and truly pay or cause to be paid unto the above-named *M. M.* her executors, administrators, or assigns, one annuity or clear yearly sum of 150*l*. yearly and every year, up to the last quarter's day of payment preceding the decease of her the said *M. M.* by four equal quarterly payments, on 10th *January*, 10th *April*, 10th *July*, and 10th *October* in each year, at or in the common dining hall of the *Inner Temple, London*, between the hours of twelve and two of the clock in the day time; and also in case the said *M. M.* shall happen to depart this life upon either of the said quarterly days of payment, then if the said *J. B.* his heirs, executors, or administrators, do and shall on demand pay or cause to be paid unto the said *M. M.* her executors &c. the whole of such quarterly payments, and do and shall make all and every the said payments, without any abatement or

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deduction whatsoever, for or on account of any charges, taxes, rates, assessments, or other matter, or thing whatsoever, whether by authority of parliament, or otherwise howsoever, and do and shall make the first payment of the said annuity or yearly sum of 150*l.* on the 10th January next ensuing the date of the above-written obligation, and do and shall pay up all costs, charges, and expenses, which may have been incurred by reason of any default in payment thereof, then the above-written obligation shall be void, or else remain in full force and entire.

*Coulter* showed cause. The recital shows that the annuity was granted in part payment for a house sold by the plaintiff to the defendant. The want of enrolment is not admissible on non est factum. Besides which, the annuity act 53 G. 3. c. 141. does not apply to annuities granted without pecuniary consideration, as in this case. *James v. James* (a), *Cumberland v. Kelly* (b), are in point and collect all the authorities. As to the stamp objection, this bond is correctly stamped under the clause for stamping bonds and deeds in general. The 55 G. 3. c. 184. sch. tit. Bond. is as follows: "Bond in England and personal or heritable bond in Scotland, given as the only or principal security for the payment of any annuity upon the original creation and sale thereof. See Conveyance upon the sale of lands, &c." The clause thus referred to is as follows: "And where upon the sale of any annuity or other right not before in existence, the same shall not be created by actual grant or conveyance, but shall only be secured by bond warrant of attorney, covenant, contract, or otherwise, the bond or other instrument by which the same shall be secured, or some one of such instruments, if there be more than one, shall be deemed and taken to be liable to the

(a) 2 Br. & B. 702.

(b) 3 B. & Adol. 602.

same duty as an actual grant or conveyance." Under the same item "Conveyance" at the beginning, it appears that a conveyance of whatever description, upon the sale of any lands &c., annuities &c., or of any right &c. therein, "where the purchase or consideration money therein or thereupon expressed shall not amount to £20k, is liable to 10s. duty on stamping the same; and so on for higher amounts of pecuniary consideration." In this instance no pecuniary consideration is expressed, nor is this the "sale" of an annuity within the scope of the stamp acts. The word "sale" in those acts must be construed in the ordinary sense of a sale for pecuniary consideration, which has been shown to be the only sale of an annuity included in the annuity act. Nor was the annuity sold for the house, but the sale of the house was the consideration for the annuity.

The following clause under title "Bond" may be relied on for the defendant: "Bond in *England*, and personal or heritable bond in *Scotland*, given as a collateral or auxiliary security for the payment of any annuity upon the original creation and sale thereof, where the same shall be granted, or conveyed, or secured, by any other deed or instrument liable to and charged with the said ad valorem duty, hereinafter imposed on conveyances for the sale of any property—11." But this stamp is valid, being of higher amount than that thus provided. The two next clauses do not apply, for they only affect bonds not given on the original creation and sale of an annuity. Now, the condition shows this bond to be given on the original contract for the annuity. *Blandy v. Herbert* (a) is in point. *L* was owner for life of certain stock, with remainder to her daughter the defendant's wife. By indenture executed by the parties, the defendant was to be empow-

(a) 9 B. & Cr. 396.

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ered to sell out the stock and pay *L.* an annuity for her life, equal to five per cent. interest on the principal money produced by the sale of the stock, and that certain policies of insurance should be assigned by way of further security. For the defendant it was insisted, that the stamp on the deed, a common deed stamp, was improper, and that an *ad valorem* stamp was necessary, the transaction being a sale of an annuity, and a conveyance of "property" within 55 *G. 3. c. 184. sch. part 1*; but Lord *Tenterden* held the contrary, and that the transaction developed in the deed could not be considered a "sale" of an annuity in the ordinary sense and acceptation of the words. *Parkè J.* asked "what purchase or consideration money was expressed in the deed?" Then the plaintiff is entitled to retain his verdict.

*Mansel* in support of the rule. *Hill v. Manchester Water Works Company* (a) shows, that upon the plea of non est factum, the defendant might prove such non-compliance with the requisites of the annuity act as would render the bond void. But the bond should have been stamped with a *4l.* stamp, for stat. 55 *G. 3. c. 184. schedule, tit. Bond*, is in the following terms: "Bond in *England* and personal and heritable bond in *Scotland*, given as a security for the payment of any annuity (except as aforesaid, viz. on the original creation and sale thereof,) or of any sum or sums of money at stated periods, (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack), for the term of life, or any other indefinite period, so that the whole money to be paid cannot be previously ascertained, where the same shall amount to 100*l.* and not amount to 200*l.* per annum—4*l.*" Here, no principal instrument creating the annuity

(a) 2 *N. & M.* 573.

exists, and the clause applies to all cases where there is no other creation or any principal instrument creating the annuity. To hold this stamp sufficient would be to induce parties to defraud the revenue of stamps, by reciting a prior creation of an annuity, which never took place. The consideration for granting the annuity is in effect pecuniary.

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PARKER B.—It appears to me that there is no foundation for either objection. The stamp is of the proper amount. For on the face of the instrument it is given originally, and is not a mere collateral security subsequently given. Then it must be stamped either as an original conveyance, or as a collateral security on it. If it is an original conveyance, no pecuniary consideration appears on the face of it, and therefore the clause imposing an ad valorem duty does not apply. On the other hand, if it is a collateral security, the stamp is larger than necessary. The later clauses of the schedule do not apply. The case falls within the general bond clause, not being to be brought within any special clause. As to the other objection *Cumberland v. Kelley* is decisive that this transaction is not within the scope of the annuity act. However, that point cannot arise on *non est factum*. Defences arising on statutes must in general be pleaded. *Hill v. Manchester Water Works Company* does not apply, for the defendants there disputed the fact, that the seal on the bond was that of the company.

BOLLAND B.—*Blandy v. Herbert* is decisive of this case.

ALDERSON B.—This is clearly a security given on the original creation of the annuity. Then the stamp is sufficient, for the reasons already stated.

GURNEY B. concurred.

Rule discharged.

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EASTON against PRATCHETT.

*[This case was argued in Hilary term, 1835, but it was thought convenient to the profession to give it a place in the present part.]*

In an action on a bill by indorsee against drawer the plea was, that the defendant indorsed it to plaintiff, without having or receiving any value or consideration whatsoever for or in respect of the said indorsement thereof, and that defendant had not at any time had or received any value or consideration whatsoever for or in respect of such indorsement. Issue having been joined on this plea, the defendant had a verdict. Held that this plea, though bad on special demurrer, was cured by verdict.

A defence that A. paid part of the bill sued on, and B. the residue, is the subject of separate pleas.

**A**SSUMPSIT against the drawer of a bill of exchange by his immediate indorsee. The bill was dated 15 May 1832, being for 100*l.* payable to the drawer's own order, at four months after date, for value received in spokes, and accepted by one *Maddock*. Second count on an account stated. Plea to the first count, that the defendant indorsed the bill to the plaintiff without having or receiving any value or consideration whatsoever for or in respect of the said indorsement thereof, and that the defendant has not at any time had or received any value or consideration whatsoever for or in respect of such indorsement; concluding with a verification. Replication, that the defendant heretofore and at the time of indorsing the said bill to the plaintiff, had and received from the plaintiff a good and sufficient consideration for and in respect of the said indorsement of the said bill to him the said plaintiff as aforesaid; concluding to the country.

The second plea was to the second count, so far as the promises in that count related to the bill of exchange in the first count, and averred payment of the amount of the bill by defendant to plaintiff, and acceptance by the plaintiff in full satisfaction thereof; concluding with a verification. Third plea to first count, payment by *Maddock* to plaintiff of 50*l.* on account of and in part payment of said bill, which plaintiff accepted in full satisfaction and discharge of 50*l.* parcel of the said sum specified in the bill, and payment by

defendant to plaintiff of the residue of the amount, which plaintiff accepted in full satisfaction of the said bill, and of all damages in respect thereof, and of all claims thereon against the defendant. Verification. Fourth plea to the last count, non assumpsit. Issues on the above pleas, admitting the payment of 50*l.* by *Maddock* stated in the third plea. The particulars of the plaintiff's demand were wholly confined to the bill.

At the trial before *Gurney B.* at the summer assizes for *Lancashire*, the defendant's counsel called the acceptor *Maddock*, who proved, that in *March* 1832 the defendant acted as agent to the plaintiff for the sale of spokes, and that at his request the witness bought certain spokes belonging to the plaintiff, on the terms of not paying for them till they were sold. That the defendant afterwards applied to him to accept the bill in suit, but the witness had not then sold spokes to the amount. On being asked on what terms he accepted the bill, the question was objected to, on the ground that the bill being unconditional on the face of it, could not be varied by oral evidence to the contrary; *Moseley v. Hanford* (a). The witness afterwards paid 50*l.* to the plaintiff on account of the bill, which payment was admitted in the third replication. Evidence was given that the defendant afterwards sent 93*l.* to the plaintiff to take up the bill. Verdict for plaintiff on the second and third pleas (of payment), and for defendant on the first and fourth issues: the jury finding on the first plea that the bill was an accommodation bill, between the plaintiff and the defendant, indorsed by the defendant without good consideration.

In *Michaelmas* term 1834, *Alexander* moved to set

(a) 10 B. & Cr. 729. The terms in fact were, that the bill should be taken up by the plaintiff when due, if sufficient spokes to answer its amount were not then sold; and that when the bill became due, only 20*l.* worth of spokes were sold.

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aside the verdict for the defendant on the first issue, and to enter judgment for the plaintiff non obstante verdicto on the first plea, contending that as it did not exclude the case of consideration having been received for the bill by another person, it was no answer to the declaration. [Lord Lyndhurst C.B. What evidence is there to show that there was no consideration between these parties, the indorsee and drawer? Alderson B. The evidence goes to want of consideration between the plaintiff and the acceptor; whereas the pleading is directed to want of consideration between the plaintiff and the drawer. Parke B. As no proof appears of want of consideration as between these parties, the evidence objected to was not material (a).] The court intimated a doubt whether it was not consistent with the first plea that the defendant might have been only a guarantist for another, and granted the rule.

Crompton (with him the Attorney-General Sir Frederick Pollock) showed cause. First, the plea is good after verdict, if not on special demurrer; secondly, if bad and not cured by verdict, a repleader should have been prayed; thirdly, only a venire de novo can be granted, as the jury which tried the issues have assessed no damages on these found for the plaintiff.

First, the plea would be good on special demurrer. It not only alleges that the defendant indorsed the bill to the plaintiff without having or receiving any value, but adds, "or consideration whatsoever, for or in respect of such indorsement." Now, the loss accruing to the plaintiff by forbearing, at the defendant's request,

(a) He had also moved for a new trial, on the ground that the acceptor had been permitted to state the terms on which he accepted; though the learned baron afterwards repudiated that portion of his evidence. That part of his motion was refused.

to sue a third person for a debt, or the benefit received by that third person at the like request, would be a good consideration for a written promise by the defendant, though he did not corporeally receive any actual personal benefit (a). That consideration might have been given in evidence under this plea; for a consideration need not be tangible, and "having" is not confined to the defendant's corporeal possession, but may include the benefit enjoyed by another at his request. It is said that the case of the gift of the bill to the plaintiff is not excluded by this plea; but unless such a transaction is nudum pactum, the gift itself would be a consideration. If a gift of a bill vests a title to it in the donee, it cannot at all events be sued on without proof or presumption of some legal consideration. In *Holliday v. Atkinson and Others, Executors* (b), the plaintiff sued on a note given to him when a child, nine years of age, by the testator, and expressed to be for value received. *Hullock B.* told the jury that the note being for value received, was *prima facie* evidence of some legal consideration sufficient to sustain the promise, which presumption it was for the defendants to disprove. He said that many good considerations might have existed, but added, that affection to the plaintiff, or gratitude to his father would suffice. After verdict for the plaintiff a new trial was granted, *Abbott C. J.* saying, "It was a question for the jury, whether the note was given on any legal consideration, and I think that the direction given to them, as to the sufficiency of gratitude to the father or affection to the son, was improper." The subject-matter of the consideration must not be confounded with the consideration itself. If the gift of a bill is not excluded by the

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(a) See cases collected Chitty jun. on Contracts, 2d ed. 26; also 1 Rol. Ab. 29, pl. 40; *King v. Wilson*, Stra. 873.

(b) 5 B. & C. 503. See *Woodbridge v. Spooner*, 3 B. & Ald. 233.

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word "consideration" in the plea, the argument must extend to this, that an action on a simple contract may be supported without a consideration. But that position cannot be maintained. The only difference in the case of a bill or note is, that it imports a consideration till the contrary is proved. That, however, shows some consideration to be as necessary for a bill as for other contracts. Thus a prior moral or even honourable obligation (a), or a debt due from a third person to the payee, *Pepplewell v. Wilson* (b), are good considerations for a bill or note. The plaintiff has, in fact, a consideration moving to him, if he obtains the suspension of the plaintiff's right to sue a third person. [Alderson B. If the giving the bill was evidence of money lent by the payee to the drawer, the plaintiff would on this issue be confined to proof of a money consideration only.] Perhaps the defendant was not bound to deny or exclude more in his plea than is alleged or implied in the declaration, viz. the presumption of law that a money consideration passed between the parties to the bill. On this presumption it is, that as between the original parties, a bill or note is itself *prima facie* evidence in support of the counts for money lent, paid, had, and received. This plea, however, denies the defendant's having had any species of consideration. [Parks B. The question is, whether the plea is good after verdict? Would the defendant have been liable had he indorsed this bill to the plaintiff by way of gift without consideration? The older cases seem to show he would (c).] However, in the later cases the court of King's Bench has held the contrary,

(a) *Lee v. Muggridge*, 5 Taunt. 36; *Gibb v. Merrill*, 3 Taunt. 311. See 2 Bla. Com. 445; 3 Bos. & Pul. 249 n.; Bayley on Bills, 4 ed. 399.

(b) *Stra.* 264; *Sowerby v. Butcher*, ante, p. 320.

(c) See *Williamson v. Losh*, cited in 7 T. R. 351, and stated from the Paper-books in Chitty sen. on Bills, 5th edit. 93, n., and in Chitty juv.

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those decisions not having been cited. The plea would be no answer if the indorsement was by grant. The new rules were not framed with a view to such a general pleading as the present. In the case of a plea that the bill was given for the plaintiff's accommodation, the rule (a) rather points to a conclusion with a verification. Its object and intention was, that the affirmative of such issues as the present should be left to be proved by the defendant. Might not the plea have been that the bill was drawn for the accommodation of the plaintiff, or by the defendant as plaintiff's agent, and indorsed over to the latter merely for his accommodation? However, if the plea would have been bad on demurrer for ambiguity, that defect is cured by verdict, for the equivocal expressions must then be taken in that sense which would sustain the verdict; *Huntingtower v. Gardner* (b), *Hobson v. Mitton* (c), *Avelly v. Hoole* (d). This is a mispleading saved by the statute of Jeoffais, 52 Hen. 8. c. 30. *Wells v. Mason* (e) was in arrest of judgment, for supposed defect in the replication; *Stoughton v. Day* (f), there cited, came on on demurrer. A verdict cures an informal issue if joined, though without proper form, on a material point (g).

Secondly, if the plea is not cured by verdict, the verdict on it cannot be set aside, as there was no mis-carriage at the trial. All that could be granted would be a retrial, the defect being not so much in the plea as in the evidence. *See per Lord Redcliffe, id. 5th edit. notes.*

(a) *Hil. 4 W. 4.*, Pleading in assumpsit, No. 3. p. xv. this volume.  
(b) 1 B. & C. 297. (c) 6 B. & C. 295.  
(d) Dole. 825. (e) 3 Burr. 1758.  
(f) *Aleyn*, 10.  
(g) *Bac. Ab. tit. Pleading* (M. 2) n.; and see *Cobb v. Bryan*, 3 Bos. & P. 348.

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substance as in stating it in a manner which raises an immaterial issue, on which the court cannot give judgment between the parties (a). For judgment non obstante veredicto is only entered where the pleading of the successful party being good in form, and the verdict being found for him, yet it is clearly apparent to the court that he can have no merits (b). Were the rule otherwise, a party might go to trial, passing over an error in the opposite pleadings, not touching the merits or title there recited, and after verdict against him successfully rely on it to obtain judgment non obstante veredicto.

Lastly, if the plea is not cured by verdict, still as no damages were assessed to the plaintiff on the issues found for him, the verdict on them is void, and a venire de novo must issue to try them again; for the jury who try the issues must assess the damages; and if they neglect to do so, or make any other omission, for which, before 6 Geo. 4. c. 50. s. 60., they would have been liable to an attain, the court cannot ascertain the damages by writ of inquiry; *Clement v. Lewis in error* (c), *Bentham's case* (d), *Cheyney's case* (e). It may be that the whole action is discontinued. [Parke B. The third plea is bad; it should have alleged as to 50l. part of the bill, that that sum had been paid by the acceptor, and then concluded to the country. It should then have been stated in another plea, that the defendant paid the residue of the bill, but the verdict has cured those errors.]

(a) See Stephen on Pleading, 1st edit. 119, citing Hobart, 113, and 3 Taunt. 386.

(b) See Tidd, 9th edit. 922, cited 2 Saund. last edit. 319 c, note (c).

(c) 3 Br. & B. 297, 7 B. M. 200, S. C.

(d) 11 Rep. 56 a.

(e) 10 Rep. 118 b. and note in vol. v. new edit. 466, collecting the cases.

*Alexander and Cowling contra*. The plea is bad in substance and not cured by the verdict. The words "value and consideration" being used in a plea, require greater strictness of construction than in a declaration, for *ambiguum placitum interpretari debet contra proferentem*; *Co. Lit.* 303. b (a). These words, read in a popular sense, must mean an apparent and tangible consideration. [Lord Abinger C. B. Your argument is, that the plaintiff having taken issue, whether or not consideration was had and received from him by the defendant, for the indorsement, could not give in evidence that he had received the bill in consideration of his forbearing to sue another, but could only prove a tangible consideration moving from him to the defendant. Our construction of the plea must be more liberal after than before verdict. *Parks B.* Supposing the consideration to have been the plaintiff's forbearance to sue another, that would have been a good consideration for indorsing this bill (b).] If the gift of a bill of itself enables the holder to sue without further consideration, and is not *nudum pactum*, the plea does not exclude that consideration for this indorsement. *Holliday v. Atkinson* (c), and *Woodbridge v. Spooner* (d) are rather contrary to the older authorities, though in the latter case the plaintiff recovered without proof of any actual consideration, the note being payable on demand and expressed to be given for value received, and for the kindness of the holder to the maker. In *Pillans v. Van Mierop* (e), the court leant to the opinion that a simple contract to pay the debt of another if written, but not under seal, needed no consi-

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(a) See instances collected 1 Chitty on Pleading, 4th ed. 456, 515, 570, 316, 331; new edit. Coke's Reports, vol. v. 353, n. B.

(b) See *Poppell v. Wilson*, Stra. 364; ante, 324.

(c) 5 B. & C. 501.

(d) 3 B. & Ald. 233.

(e) 3 Burr. 1663. See per Lord Mansfield and Wilmut J.

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denation; on only a spark of consideration. [Lord Abinger C. B. As to bonds, the parties are estopped by the deed (a); but as to written agreements, notwithstanding it is different.] The contrary doctrine to *Pillans v. Van Meerop* has been since laid down in *Houss v. Hughes* (b) and *Johnson v. Collins* (c). In *Lord Abinger C. B.* In *Pillans v. Van Meerop* the validity of a verbal promise to accept a bill not then drawn, was decided on other grounds besides that of nudum pactum. [The enactment of 11 & 12 Geo. 4. c. 78. s. 8. only applies to inland bills.] In *Clark v. Cobb* (d) (and *Tate v. Herbert* (e)), *Pillans v. Van Meerop* is again cited as valid authority, and the equity cases of *Roe v. Herbert* and *Seton v. Seton* (f), are in favour of maintaining an action on a note given to the holder. In *Mitchell v. Gault* (g) is cited by *Blackstone* in his Commentaries (h) as showing that a man who gives a promissory note shall not be allowed to plead a want of consideration in order to evade the payment; for the drawer's signature carries with it internal evidence of a good consideration on a bill. In *Charles v. Matthews* (i) and *Lefebvre v. Lloyd* (j), were also cited as instances of other considerations for the bill, which were not excluded by the plea. [Part B. of these cases do not apply to this question. In *Stein v. Gleason*, which came on here on demurrer to a plea in last Michaelmas term, *Charles v. Matthews* was cited to show the fact of want of consideration, even when joined with

(a) 12 Bl. C. 295; Com. Dig. Estoppel; (b) 1 Bl. C. 419; 2 Bl. C. 444; 544; 545; 546; 547; 548; 549; 550; 551; 552; 553; 554; 555; 556; 557; 558; 559; 560; 561; 562; 563; 564; 565; 566; 567; 568; 569; 570; 571; 572; 573; 574; 575; 576; 577; 578; 579; 580; 581; 582; 583; 584; 585; 586; 587; 588; 589; 590; 591; 592; 593; 594; 595; 596; 597; 598; 599; 600; 601; 602; 603; 604; 605; 606; 607; 608; 609; 610; 611; 612; 613; 614; 615; 616; 617; 618; 619; 620; 621; 622; 623; 624; 625; 626; 627; 628; 629; 630; 631; 632; 633; 634; 635; 636; 637; 638; 639; 640; 641; 642; 643; 644; 645; 646; 647; 648; 649; 650; 651; 652; 653; 654; 655; 656; 657; 658; 659; 660; 661; 662; 663; 664; 665; 666; 667; 668; 669; 670; 671; 672; 673; 674; 675; 676; 677; 678; 679; 680; 681; 682; 683; 684; 685; 686; 687; 688; 689; 690; 691; 692; 693; 694; 695; 696; 697; 698; 699; 700; 701; 702; 703; 704; 705; 706; 707; 708; 709; 710; 711; 712; 713; 714; 715; 716; 717; 718; 719; 720; 721; 722; 723; 724; 725; 726; 727; 728; 729; 730; 731; 732; 733; 734; 735; 736; 737; 738; 739; 740; 741; 742; 743; 744; 745; 746; 747; 748; 749; 750; 751; 752; 753; 754; 755; 756; 757; 758; 759; 760; 761; 762; 763; 764; 765; 766; 767; 768; 769; 770; 771; 772; 773; 774; 775; 776; 777; 778; 779; 780; 781; 782; 783; 784; 785; 786; 787; 788; 789; 790; 791; 792; 793; 794; 795; 796; 797; 798; 799; 800; 801; 802; 803; 804; 805; 806; 807; 808; 809; 810; 811; 812; 813; 814; 815; 816; 817; 818; 819; 820; 821; 822; 823; 824; 825; 826; 827; 828; 829; 830; 831; 832; 833; 834; 835; 836; 837; 838; 839; 840; 841; 842; 843; 844; 845; 846; 847; 848; 849; 850; 851; 852; 853; 854; 855; 856; 857; 858; 859; 860; 861; 862; 863; 864; 865; 866; 867; 868; 869; 870; 871; 872; 873; 874; 875; 876; 877; 878; 879; 880; 881; 882; 883; 884; 885; 886; 887; 888; 889; 890; 891; 892; 893; 894; 895; 896; 897; 898; 899; 900; 901; 902; 903; 904; 905; 906; 907; 908; 909; 910; 911; 912; 913; 914; 915; 916; 917; 918; 919; 920; 921; 922; 923; 924; 925; 926; 927; 928; 929; 930; 931; 932; 933; 934; 935; 936; 937; 938; 939; 940; 941; 942; 943; 944; 945; 946; 947; 948; 949; 950; 951; 952; 953; 954; 955; 956; 957; 958; 959; 960; 961; 962; 963; 964; 965; 966; 967; 968; 969; 970; 971; 972; 973; 974; 975; 976; 977; 978; 979; 980; 981; 982; 983; 984; 985; 986; 987; 988; 989; 990; 991; 992; 993; 994; 995; 996; 997; 998; 999; 1000.

(b) In error, 7 T. R. 359, n. (a); 7 Bro. C. R. 251, n. (a); 1 East, 104.

(c) 1 East, 104.

(d) 2 Ves. jun. 111, 116; 4 Br. Ch. C. 286.

(e) 2 Br. Ch. C. 610; but see Lord Reddale's note, 5th ed.

(f) Lord Raym. 260; 10 Mod. 144; 11 Mod. 445.

(g) 1 Taunt. 224.

(h) 5 Taunt. 259.

that of indorsement after the bill became due, does not afford a defence if pleaded, without going on to aver that the plaintiff gave no consideration; and we gave leave to amend.] If *Pillans v. Van Mierop* is no longer law, still this issue is confined to consideration received by the defendant for the indorsement, and does not exclude consideration received for it by any other. If the bill had been drawn and indorsed by the defendant to the plaintiff at the request of the acceptor *Maddock* to accommodate him, then a consideration would have moved from the plaintiff to the acceptor, who might have been sued; *Stevens v. Wilkinson* (a). The question of want of consideration cannot arise in actions by indorsee against indorser as the sole defence, for the liability of the acceptor is the defendant's consideration. Had *Maddock* and the defendant, whose joint undertaking the bill was, indorsed it jointly with the defendant, the latter could not have insisted on want of consideration; *Price v. Edmunds* (b), *Perfect v. Mudge* (c). *Popplewell v. Wilson* shows that the debt of another is a good consideration for a person's binding himself by a bill. That case was cited for that point, in *Sowerby v. Butcher* (d), by *Bayley B.*, who added, that "the consideration of a bill need not necessarily be such as would maintain an action on a special contract." That transaction was a mere gift of the bill by the drawer to the payees, the plaintiffs, without consideration moving to the drawer. [Lord Abinger C. B. Can you say that the drawer in that case had not consideration if he desired to cover his brother's embarrassment, and volunteered to pay the debt due from him to save his credit? On a similar ground, all the cases in which detriment to a plaintiff

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(a) 2 B. & Adol. 346. See judgment of *Parks J.* (b) 10 B. & Cr. 387.

(c) 6 Pri. 215.

(d) *Ante*, p. 324.

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resulting from his reliance on the promise of a defendant, has been held to be a good consideration for such promise, would be excluded by this plea as not being a consideration had or received by the defendant. Now the courts have held, that if a defendant has had his wish and attained an object, not illegal, by means of a promise made, that promise shall be binding. Thus a party who guaranties the act of another receives no consideration for incurring that liability: his object is not tangible, being either to help his friend to obtain credit for him, or the like; yet it is equally gained if that aid is rendered or that credit afforded; and he is therefore held liable, subject to the provisions of the statute of frauds as to form. The consideration to the party guarantied arises from the goods he obtains in consequence of the promise; the consideration to the party guaranteeing is the obtaining the object he had in view, of obtaining a benefit for his friend. Each has a separate consideration of a different kind.] Had the declaration been in debt the plea would perhaps have been sufficient; but though the plaintiff might have a good cause of action against the defendant, debt might not be the form in which it should be brought (*a*). The plea should have stated that the indorsement was made without a good and legal, or any consideration; *Smith and others v. Dovers* (*b*), *Hedges v. Sandon* (*c*). [*Parke B.* In *Hedges v. Sandon* those words occur only in the indorsement, not in the traverse.] No discontinuance can happen, for this plea, professing to answer a part, answers not the whole, but that part only (*d*). Nor can a repleader be granted in favour of the person making the first fault in pleading, it will only be granted in a case where the court see justice cannot be

(*a*) See *Anon. Hardres*, 485; *Freeman v. Freeman*, Rol. R. 61.

(*b*) 3 Doug. 428. (*c*) 2 T. R. 439. (*d*) 1 Wms. Bound. 37 *n*.

done without sending the case down again (a). As to the omission to assess damages on the issues found for the plaintiff, the ground for not awarding a writ of inquiry to do so was, that the remedy by attaint under 34 *Edw. 3. c. 7*, would thereby be lost; but as that proceeding, so long obsolete, has been formally abolished by 6 *Geo. 4. c. 50. s. 60*, since *Lewis v. Clement* was decided, *casante ratione cessat lex*.

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*Cur. adv. vult.*

On a subsequent day the judgment of the court was delivered by

LORD ABINGER C. B.—This case came before us on a rule for entering up judgment non obstante veredicto on the first plea; and the question being a matter of importance since the new rules, we thought it right to take a short time to consider our judgment. The defendant, the drawer of a bill of exchange, was sued as indorser by his immediate indorsee. The defendant pleaded that he indorsed the bill to the plaintiff, without having or receiving any value or consideration whatsoever for or in respect of such indorsement, and that he had not at any time any value or consideration for the said indorsement. Issue having been joined on this plea, the jury have found for the defendant, viz. that there was no consideration for the indorsement of the bill.

A motion was afterwards made to enter up judgment for the plaintiff notwithstanding that verdict, on the ground that the plea was insufficient; and a rule having been granted in last term, the case was very learnedly argued on both sides. We have considered it, and are of opinion that this plea, though it would be clearly bad on special demurrer, is sufficient after verdict. It would have been bad on special demurrer before the

(a) *Goodburns v. Bowman*, 9 Bing. 531.

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late general rules came into operation, because it would amount to the general issue only; nor does it appear to us that, since those rules, such a plea can be supported. Before they were made, the defendant was in many cases able to throw on the plaintiff the burden of proving affirmatively the consideration for the bill; the intention of the new rules was to oblige the defendant to set out on the record the transactions which he intends to rely on in evidence, in order to show that the plaintiff had no right to recover, so as to give him, by the matter set out in the plea, real notice of what the objection is; as, for example, that it was an accommodation bill, or given for a consideration which afterwards failed, or on a gambling transaction. In most of these instances *prima facie* evidence must be given by the defendant, to enable him to call upon the plaintiff for an answer, by proof of the consideration. But the intention of the new rules of pleading to which I have alluded will fail, if a plea of this sort is allowed, viz. that the plaintiff has given no consideration for the bill; for that would leave the plaintiff in the same situation as before, subject to the burden of proving the affirmative.

Being of opinion that the plea would have been bad on special demurrer, as well before as since the new rules, the question here is, whether, after the verdict which the jury have found for the defendant, we can consider it bad, and we are all of opinion that we cannot. It is clear that at the trial both parties were at liberty to go into evidence with respect to the consideration of the bill, and we must assume that the defendant has entitled himself to a verdict, and that the bill was indorsed without consideration.

The other question which has arisen is, whether upon the particular mode of pleading this want of consideration, the plea itself was not necessarily bad. If

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was contended that the plea that the defendant indorsed the bill to the plaintiff, without "having or receiving" any value or consideration, did not necessarily exclude that species of consideration which did not lie in the actual tangible possession of the defendant; and that there might be a moral obligation on the defendant, on a consideration of forbearance to sue a third person, or of giving credit to another; all which, it was said, were considerations good in themselves for indorsing a bill, but which could not be said to have been had (or possessed) or received, by the defendant himself. But, we are of opinion that that objection to the plea cannot be maintained; for in the cases put, the defendant may, both in common and legal language, be said to have *had* the consideration. If a man sought to obtain credit for another, by giving this security for him, or to induce the plaintiff to forbear to sue a third person, the defendant may be said to *have* (or possess) the consideration, because he receives the benefit that he intended to get for giving his bill. So if forbearance be obtained, he possesses it and receives the benefit sought, and may be fairly said to have received consideration. We think that that is a sufficient answer to that part of this objection.

The next branch of the objection is, that a bill of exchange may be indorsed by one man to another as a gift; and that such an indorsement would be binding without any consideration at all, pecuniary or other. Now supposing that to be true, it might in one sense be without consideration, *i. e.* without pecuniary consideration, but surely if such a bill could be the subject of an action, it could only be on the ground that there was some consideration of affection, personal regard, desire to promote the party's interest, or something of that kind. Between relations natural love and affection is said to be the consideration; I however go farther,

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for I think that though it may be true that a man who gives money to another cannot recover it back by action, yet that if he promises by parol to give money without consideration, no action at law lies against him to recover it. I do not see how the fact that the promise is in writing, not under seal, can make any difference, or give any more right to bring an action than if it were oral. The law makes no distinction between a written promise not under seal, and a promise by word of mouth (*a*). A bill of exchange is an assignable contract, but between the parties privy in contract, it does not differ from any other parol promise. Can a parol promise to pay or give at a future day be in itself a consideration, so as to found an action for a default to pay accordingly?

It is true that if a party receiving, by gift, a bill on which others besides the giver are liable, shall recover its amount from those other parties, the giver cannot recall or recover the gift; but the question whether he has bound himself to pay the bill is very different. As oral and written promises not under seal are alike contracts by parol and of no dissimilar obligation in law, so we think that for the purposes of this argument, a gift of a bill would not be such a consideration as would sustain an action on it against the giver. We are therefore of opinion, that as this plea in effect alleges that no consideration whatever was given for the indorsement of this bill, or had or received by the defendant on that account, it is sufficient after verdict for the defendant on those facts. We cannot therefore disturb that verdict, and this rule must be discharged.

Rule discharged.

(*a*) See per Skynner C. B. in delivering the opinion of the court of error in *Kann v. Hughes*, 7 T. R. 350, n.

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DANIEL MALLET BRITTEN, Administrator of J. SAUNDERS(a), against DANIEL BRITTEN, PERROT, and WATTS.

**C**OVENANT by the administrator of *Saunders*, on an indenture of lease by *Saunders* the intestate to the three defendants, of certain factories and machinery, fixtures, &c., upon the tenements therein mentioned, which had been used for carrying on the trade of a packer and calenderer, for six years and a quarter, wanting thirty days, commencing 25 March 1830, at a certain rent, payable on the usual quarter days. The indenture provided, that at the expiration of the term, the defendants should leave machinery, &c., of equal value, or should pay the difference. Breaches: Non-payment of rent, and that although the term has expired, the defendants have not delivered up machinery, &c. of equal value. Pleas, by *Perrott* and *Watts*: 1st. *Non est factum*. 2dly. That at the time of the demise, the machinery was held by the intestate *Saunders*, in trust for *D. Britten*, the other defendant, and that all the beneficial interest in the premises, with the said machinery, &c. was in *D. Britten* till he became a bankrupt. The plea then averred the proceedings in bankruptcy, and the assignment of all the bankrupt's interest in the premises, with the machinery &c., to *W. P.* and *B.*, and that on the expiration of the term, *Perrott* and *Watts*, as two of the defendants, paid the arrears of rent, and did yield up to the said *W. P.* and *B.* machinery, &c. upon the demised premises, of equal value to the machinery, &c. in the declaration mentioned, and thereupon they pray judgment. Similiter to the first plea. Demurrer to the second, alleg-

It is no defence at law to an action on an indenture of lease by the trustee of a party who has become bankrupt, that the defendants, the lessees, have performed their covenants with the assignees of the cestui que trust.

(a) "For the use of *Jane Britten*, and until she shall duly apply for and obtain letters of administration of the goods of the said *J. S.*"

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ing for cause that it improperly offered matter of mere trust and equity as an answer to an action at law; that although there are three defendants, and it offers matter in bar of the action, yet the second plea improperly prays judgment as to two of them only. The Court called on

*Erle* to support the plea. The defendants have handed over the bankrupt's property to the assignees as the law would have compelled them to do. This is analogous to cases where the bankrupt, having a mere legal estate in trust for others, and also a beneficial interest, the legal estate has been held not to pass to the assignees, but to remain in the bankrupt for the purposes of the trust, while the beneficial interest vests in his assignees. [Lord *Lyndhurst* C. B. The assignees are substituted for the cestui que trust, and all his beneficial interest is transferred to them. *Alderson* B. If they the defendants had not paid the assignees, they could not have brought the action. Lord *Lyndhurst* C. B. The assignees might have compelled the lessor to sue for their benefit in his name.] *Scott v. Sorman*, (a) and *Winch v. Keeley* (b), show that courts of law will take notice of equitable rights. The lessor has brought the action without the consent of the assignees. [Lord *Lyndhurst* C. B. That is at law correct; the defendants have their remedy in equity. The accurate administration of justice in both tribunals requires that their jurisdictions should be kept separate (c).] But though these defendants may not be able to enforce the rights of the cestui que trust, as plaintiffs in an action, they only here seek shelter under those of the assignees. In *Carvalho v. Burn* (d), *Littledale J.*, says, "It is quite clear that the assign-

(a) *Willes*, 400.

(b) 1 T. R. 619.

(c) See *Baucrman v. Radenius*, 7 T. R. 663.

(d) 4 B. &amp; Ad. 393.

ment vested in the assignees all the personal estate and effects in which the bankrupt was, at the time of the bankruptcy, *beneficially* interested with the statutory exceptions 6 Geo. 4. c. 16. ss. 81, 82. 86. 112, but as the object of the assignment of the bankrupt's property is that it may be applied to the payment of his debts, it is equally clear that nothing passed by it, which the bankrupt then held in trust for others, or in which he had only a mere legal interest." He goes on to show that if, at the time of the bankruptcy, the bankrupt possessed a possibility of interest from which a benefit to his creditors might result, the whole would pass by the assignment, and cites *Scott v. Surman*, *Winch v. Keeley*, *Carpenter v. Marnel*(a), and *Gladstone v. Hadwen*(b). The assignees having taken possession of the property, the common law acknowledges their right, and the defendants cannot be called on to pay damages for handing over the bankrupt's property to them. A court of common law will take notice of legal and equitable rights, and if they can distinguish rights, they can recognize duties arising from them. [Bolland B. In *Gerrard v. Aylmer*(c), the defendant A., being indebted to C., a bankrupt, the defendant and the bankrupt became bound to M. L. for the money, in trust for the bankrupt; a commission then issued, and this debt was assigned to the plaintiff, a creditor; M. L. died, and his executor released the debt; it was held, that the interest of the bankrupt was transferred to the creditor by the statute, and that the release was no bar to an action of debt by him.] That shows that the Court will take notice of the beneficial interest. So, where goods had been sold by a factor, on credit, the beneficial interest of the principal in the price, prevailed against the legal

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(a) 3 B. &amp; P. 40.

(b) 1 M. &amp; S. 517.

(c) Palm, 805.

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interest of a bond creditor who claimed the price as the factor's assets; *Burdett v. Willett* (a). [Lord *Lyndhurst* C. B. Does the statute enable the assignees to do more than the party beneficially entitled as cestui que trust might have done? He might assign his interest. Does that make a difference as to the party who is to sue? The legal estate is still in *D. M. Britten*, and an action would lie in his name.] [*Parke* B. Does the bankruptcy make any difference in law? Your argument is, that the plaintiff is trustee for one of the defendants, *viz.* the bankrupt; can the act do more than vest the trusts in the assignees, so as to make them hold for the creditors what was held before by the cestui que trust?]

It vested a right in the assignees which might have been enforced by them against the defendants, under the bankrupt act. [Lord *Lyndhurst* C. B. Directly they brought an action you might have filed a bill for an injunction.] Trusts were noticed in *Allen v. Impett* (b), where the assignees recovered from the trustees, under a marriage settlement, dividends which they had covenanted to permit the bankrupt to receive. [Lord *Lyndhurst* C. B. No doubt we notice trusts—that is, we know what they mean, and that the beneficial interest differs from the legal.]

*Mansel* was to have supported the demurrer.

LORD LYNTHURST C. B.—We have no doubt on the subject. We must decide here a point of law, according to the rules of a court of law. If the decision lead to hardship, the defendants may apply to a court of equity, where, if the application is in time, they will have a remedy. We constantly take notice what a trust is. Here the assignees are substituted for the

(a) 2 Vern. 638.

(b) 8 Taunt. 263.

cestui que trust, that is, by the operation of the statute 6 Geo. 4. c. 16. In *Gerrard v. Aylmer*, cited by my brother *Bolland*, the action was not on the bond, but on the debt for which the bond was given.

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PARKE B.—The only case which applies is that in *Palmer*, and that is distinguishable. The bond was there given to secure a debt, not as an extinguishment of it; and though the bond was extinguished by a release, the court held that the debt was not. No assignment took place at that period of the bankrupt laws, but the commissioners divided the goods among the creditors.

The rest of the court concurred.

Judgment for the plaintiff.

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KNOWLES *against* LYNCH.

JUDGMENT had been obtained in the Palace Court for 60% of which 20% had been levied; the defendant was not to be found within the jurisdiction of that court, and had no more effects there, but he had other goods at *Hull*.

The court will remove a judgment from an inferior court, in order to issue execution thereon pursuant to 19 Geo. 3. c. 70. s. 4. though part of the debt has been levied by process from the inferior court.

*Comyn* moved for a certiorari to remove the judgment into this court, that the plaintiff might issue execution for the remainder of the debt, pursuant to 19 Geo. 3. c. 70. s. 4. The section applies, though not in express terms, where part of the damages have been levied.

LORD LYNTHURST C. B.—The preamble of the section seems to contemplate courts whose jurisdiction is only to the amount of 10%.

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It being certified that such interference was frequent as to judgments in the Palace Court, and that such was the practice of the King's Bench, the Court granted a

Rule absolute in the first instance.

ANNE BYNE and CATHERINE CANN LIPPINCOTT, an Infant, by her next friend, ANNE BYNE, *against* W. W. CURREY, and Others.

Where a testator in his will directs that one class of legacies "shall be paid prior to his debts and other legacies, and that all his legacies shall be paid within two years, free from legacy duty," the exemption from duty is not limited to such legacies only as are payable within two years, but the general words "all my legacies," will include a legacy given by a subsequent codicil, which is made payable at a different time.

**SIR HENRY CANN LIPPINCOTT** by will dated 20 July 1822, duly executed to pass real estates, bequeathed, among others, pecuniary legacies to the *Glocester, Bristol, and Bath* Infirmaries; and then gave the following directions, "*which three charitable legacies* I direct may be paid out of my personal estate, prior to the payment of my debts, and the other legacies hereby by me given and bequeathed. I direct all my legacies to be paid within two years after my decease, free of any deduction for tax or duty or otherwise howsoever, and that such of my said legacies as shall not be paid within that period shall carry interest at 4l. per cent. from the expiration of the said two years.

The testator then gave certain freehold and leasehold estates, particularly described, and all his personal estate, to trustees, whom he also made his executors, upon trust to convert the personalty into money, and to sell, with certain exceptions, the freehold and leasehold estates; he then directed that the trustees should stand possessed of the monies so arising, "upon trust to pay his debts, and funeral and testamentary expenses, and the several legacies thereinbefore by him given," (except the charitable legacies which are to be paid out of the personal estate only,) and if insufficient,

the deficiency to be raised by mortgage of any part of his freehold lands.

On 25 May 1825, the testator, by a codicil, gave 1000*l.* to *A. B.*, to be "paid immediately" after his death. In July 1829 he made another codicil, containing the following bequest:—"I give to *Catherine Cann Lippincott*, the daughter of the said *A. B.*, born 16 December 1828, and baptised in the parish of *St. Mary-lebone*, the 22 January 1829, residing with me, the sum of 5000*l.*, raiseable immediately after my decease; and in case my personal estate shall be insufficient to pay the above legacies, after payment of my debts, and the legacies given by my will, I charge the same on my real estates." Then followed directions about her education, and, in conclusion, "In all other respects I ratify and confirm my said will."

The case originally came on before Lord *Lyndhurst*, sitting in equity, who reserved a question, by the special case, for the opinion of the full Court, whether the legacy of 5000*l.* bequeathed by the second codicil was given free from the legacy duty.

*Jervis* and *Rolfe* for the legatee. To charge the real estate it must be shown, first, that the testator intended to include all legacies by the generality of the charge; and, secondly, that the charge of legacies on land by an attested will is sufficient to charge legacies given by an unattested codicil, and that enough has been done, according to the statute of frauds, to include the codicil.

"A codicil is always considered as part of the will, and the intent of the testator is to be drawn from the whole;" *Thurlow C.*, in *Hill v. Chapman*(a). Where there is a substitution or addition of legacies, and no times are appointed, or funds assigned, they are to be paid out of the same property, and on the same terms

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(a) 1 Ves. jun. 407.

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as those in lieu of which they are given; *Leacroft v. Maynard*(a), *Crowder v. Clowes*(b). *Roper* on Legacies(c). As to legacy duty being paid; when a testator gave 4000*l.* to trustees, in trust for a daughter till she came of age, the duty to be paid by his executors out of the residue, and afterwards, by codicil, revoked the gift of 4000*l.*, and raised it successively to 5000*l.* and 6000*l.* upon the same trusts, being "desirous of increasing the same;" it was held, not a revocation but a substitution, and the 6000*l.* therefore was exempt from the legacy duty; *Cooper v. Day*(d). [Lord *Lyndhurst* C. B. That was decided expressly on the ground of substitution. If the legacies had been cumulative, the second would be liable to duty.] If by the will the real estate has been charged with the payment of the legacies in general, the words will take in the legacies in the codicil, *Masters v. Masters*(e), even where the codicil is not properly attested, *Brudenell v. Broughton*(f), nor duly executed, for it is still part of the will. See per Lord *Hardwicke*, *Hannis v. Packer*(g), *Jackson v. Jackson*(h). [Lord *Lyndhurst* C. B. By the second instrument in *Jackson v. Jackson*, the land was devised in trust for the nephew, subject to such "legacies as were thereafter given," and then the legacies were given. These cases would apply if the testator had said, I direct all my legacies to be paid within two years after my death, without legacy duty. If a testator charges legacies generally, on his real estate, and afterwards, by a codicil, gives legacies, they are, no doubt, within the charge. But here is a material distinction between the will and the codicil. By the will all the legacies are to be paid within two

(a) 1 Ves. jun. 279; 3 Bro. C. C. 233, S. C.

(b) 2 Ves. jun. 449.

(c) Vol. I. 760.

(d) 3 Mer. 154.

(e) 1 Peere Wms. 423.

(f) 2 Atk. 268.

(g) Amb. 356.

(h) 2 Cox, Ch. Cas. 35.

years, by the codicil, immediately. *Parke B.* In cases where the legacies are to be paid within two years, two and a half per cent. duty is payable; in the codicil, ten per cent.] The time when the legacies are to be paid does not interfere with the direction that they should be paid free from legacy duty. The legacy in the will is to be paid within, not at the expiration of, two years after testator's death. The executor may find it convenient, but is not bound to postpone payment for that time, and in the codicil the money is to be "raiseable" immediately, but it may not be raised. [Lord *Lyndhurst C. B.* But it shall vest immediately, and a fund must be raised, because her education is to be provided for.] Her share would be liable to abate proportionably with the others, notwithstanding the different periods of payment. [*Parke B.* The postponement for two years may be part of the consideration of the legacy being paid without the legacy duty, how can you say that that which is to be paid immediately is within the same reason? The money making money for two years, for the benefit of the residue, may be the reason for no duty being payable. If nothing had been said about "raiseable immediately," the condition would apply to the legacy in the codicil. [Lord *Lyndhurst C. B.* There is one entire proposition in the will to pay the legacy, and without duty. In the codicil the proposition is distinct. How can the court safely come to the conclusion that the legacy which is to be raised immediately, is to be considered in the same light as a legacy which is to be paid in two years?] The legacies are payable within two years, but it was competent for the executors to pay at any moment. [Lord *Lyndhurst C. B.* The legatee could not claim.] If the interest accruing had been the reason, the testator would have made them payable "after," not "within" two years, else the party by the will would be in a better situation than by

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the codicil; but the testator could not intend that the infant, who was his natural daughter, should be worse off than the others, *Charteris v. Young*(a). [Lord *Lyndhurst* C. B. There a legacy to the husband, after one to the wife had lapsed by her death, was not a substitution in the sense in which it is used in cases of this kind. It was decided to be a substantive bequest.] By the will, which gave a legacy to testator's daughter, Mrs. *Young*, he directed that all the legacies "thereinbefore bequeathed," should be paid free of duty, but the legacy to the husband was by a subsequent codicil.

*Simpkinson* and *Koe* for the executors. The question is as to the testator's intention; this is to be collected from the will and codicil taken together. It is not disputed that where a testator duly charges his real estate with legacies, he may by an unattested codicil add to them; and that such added or substituted legacy must partake of the nature of that for which or to which it is added. In *Jackson v. Jackson*(b), after giving several legacies, the testator devised his real estates &c. subject to the said "thereinbefore mentioned annuities and legacies;" which *Buller* J. held to be equivalent to a general charge of legacies. But that decision is not justified by any authorities, and is at variance with some. *Masters v. Masters*(c) is strong against it, where the words "above mentioned" in the will are held not to include legacies in the codicil. So *Charteris v. Young*, the expression "hereinbefore given," was held not to apply to a subsequent instrument. Where there was a devise of a term to trustees to levy a sum for the payment of legacies "thereby given," and "several legacies hereinafter bequeathed,"

(a) 6 Madd. 30; 2 Russ. 183.

(b) 2 Cox's Ch. Ca. 35.

(c) 1 P. Wms. 421.


and a codicil unattested gave a provision to some legatees in addition "to their said legacies," the latter legacies were held not chargeable on their real estate; *Bonner v. Bonner* (a). [Lord *Lyndhurst* C. B. If the words had been "all my legacies free of legacy duty," it would have applied to the codicil. The ground of the decision was, that it was not a general charge of legacies.] So where the terms as well as the amount of a legacy are made to vary in the codicil, *Burrows v. Cotterell* (b). There by the will an annuity free from duty was given to A. and B., and after the death of the survivor, over to C.; by the codicil this was revoked, and an annuity of a less sum given, without mentioning the gift over to C. A distinction is made in the will between the charity and other legacies; the charity legacies are not only to be paid in preference to his other legacies, but even before his debts, and are not to wait for the end of two years. The proper construction is, that the charity legacies should be paid immediately, not without the legacy duty; that the legacies which are postponed to the end of two years should be free from duty. The charge therefore is not general, but only on legacies payable at the end of two years. [Lord *Lyndhurst* C. B. It is a difficult position to say that the charity legacies are not included within "all my legacies."] The legacies are not payable till two years, because the interest is not to run till then; it is not so with the charity legacies. [Lord *Lyndhurst* C. B. The charity legacies are to be paid immediately; then comes the clause "all my legacies to be paid within two years;" then "free from duty;" that is, "all my legacies free from duty." In that case "all my legacies" would bear interest from two years, which is not consistent with the provision for the immediate payment of the charity legacies.] Those lega-

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(a) 13 Ves. 379.

(b) Ib. 383; 3 Sim. 373.

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cies are not demandable till after two years, which are to be paid out of the real estate. The interest being only in default of payment can only run from the time when the principal is due. [Lord *Lyndhurst* C. B. You say that "all legacies" means only the legacies given by the will, because those only are charged in the real estate.]

*Jervis* in reply. If the only words had been "all my legacies," it being a general charge would have included after-given legacies. The introduction of the provision "to be paid within two years," does not restrict the general sense of the preceding words to legacies of that class, because without doubt the charity legacies, which are to be paid forthwith, are within the exemption in the will. *Bonner v. Bonner* (a), which was cited in opposition to *Jackson v. Jackson* (b), was the case of an additional legacy, and was not to be paid out of the same fund.

LORD LYNDHURST C. B.—I am of opinion that the duty is not payable in respect of this legacy. It is said that as the legacies given by the will to individuals are not payable till the expiration of two years, but the legacy in question is raiseable immediately, it is on a different footing, and not within the words of exemption. That makes it necessary to look to the will. By that there are two classes of legacies, to charitable establishments and to individuals. The testator meant that the first should be paid immediately, for he directs them to be paid before his debts; after that he directs all his legacies to be paid within two years, by which I understand the legacies to charitable institutions are due as soon as they can be paid, and all the legacies are due in two years. These are all to be without

(a) 13 Ves. jun. 379.

(b) 2 Cox's Ch. Ca. 35.

duty, comprehending the charitable legacies; even those legacies which are payable immediately are to be free; therefore there is no reason that legacies payable by codicil, though raiseable immediately, should not have been intended by him to be given free from legacy duty.

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PARKE B.—At first it appeared to me that the postponement of payment of the legacies, and their being free from duty, formed a connected proposition: and it occurred to me that the postponement of payment for two years was the consideration for the non-payment of the duty, and that when the codicil said the legacy then given was to be “immediately paid,” it was not intended that it should be so paid without the duty, because that consideration failed. But in the course of the argument I have come to the conclusion that we may read the will and codicil as consisting of two dispositions:—The first provides that some of the legacies shall be payable within two years, and the charitable legacies immediately; the second directs that “all” his legacies should be paid free of duty. The charity legacies come within the general description, and the legacy given by the codicil is on the same footing as these, and therefore in the same manner should be exempt from duty.

BOLLAND and GURNEY Bs. concurred.

### BURN *against* MORRIS.

TROVER for a bank note for 20*l*. A clerk of the plaintiff had lost the note in the street; it had been picked up by a woman; the defendant's son took it to the *Bank of England* to be changed, and brought

though part of the proceeds has been paid by him to the plaintiff. The acceptance of part does not affirm the taking, so as to waive the tort, but the amount received will go in reduction of damages.

Trover lies for a lost bank-note, which the defendant has tortiously converted to his own use,

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the proceeds to the woman, who then gave him two sovereigns. The woman was afterwards taken before the lord mayor, and seven sovereigns, which were found upon her, were restored to the clerk as part of the proceeds. At the last *London* sittings before *Bolland* B. the jury thought that the son was agent to his father the defendant, and found a verdict for the plaintiff, damages 13*l*. The learned judge having reserved leave to move to enter a nonsuit,

*Bompas* Serjt. now moved. Trover does not lie for the whole note, after the clerk had received 7*l*. as part of its proceeds: for the party must either affirm or disaffirm the whole transaction. Taking the change was affirming the act, and the plaintiff cannot now say that it is wrongful. As where a sheriff sells property of a bankrupt, the assignees of a bankrupt have a right to treat him as a wrong-doer; but if they claim the produce they affirm the sale, and cannot turn round and say it was wrongful; *Brewer v. Sparrow* (a).

LORD LYNTHURST C. B.—In that case the whole proceeds of the sale were taken; that is an adoption of the act; here the receipt of the 7*l*. does not ratify the act of the parties, it only goes in diminution of damages.

VAUGHAN B.—Property in the note was proved and a conversion, and there was no waiver of the tort.

Rule refused.

(a) 7 B. & C. 310.

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HATSALL *against* GRIFFITH.

**T**HIS was an action of assumpsit to recover the value of twenty-one sixty-fourth parts of the brig *Rhoda*, of which the plaintiff was part-owner with two others, *Brown* and *Prothero*, who were living at *Bristol*. The defendant was employed as broker to sell the ship, *Prothero* and *Brown* communicating with him on the subject. The plaintiff's share after the sale being admitted, in letters from the defendant, to be 340*l.*, the plaintiff desired him to pay over that sum to his bankers in *London*, which he refused to do without the consent of the other two part-owners, though he had already paid them their shares. At the trial at the *London* sittings in this term the plaintiff was nonsuited.

A broker was employed to sell a ship belonging to three part-owners, two of whom communicated with him on the subject. To them he paid their shares of the proceeds of the sale, but after admitting the amount of the third part-owner's share to be in his hands, refused to pay it to him without the consent of the other two. An action of assumpsit having been brought by the third part-owner for the share: Held, that he was not entitled to recover.

*D. Pollock* now moved to set aside the nonsuit and enter a verdict for the plaintiff. Every part-owner may sell his share of a vessel at any time without the consent of any other. When the amount of his share is ascertained or is capable of being separated, it becomes his undivided share, and he may sue for it. It is true that in an action to recover freight, all the part-owners must join, because all are partners with respect to the concerns of the ship (*a*), but that is not in respect of the ownership (*b*); and even in case of freight, it is added, "unless perhaps some one should have received his own share or have released his claim to it." [Lord *Lyndhurst* C. B. There is no doubt about the right to sue separately under certain circumstances; but the question here is, whether the contract to sell was made by the defendant with all the

(a) *Abbott* on Shipping, 3d edit. 98.

(b) 1 *Phil. Evid.* 391; 1 *Stark. Evid.* 2d edit. 210.

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owners jointly, for if it was, all should have sued. *Parke* B. Was he employed by all jointly to sell the ship as one thing for all, or by each to sell the share of each? Lord *Lyndhurst* C. B. Suppose there are three joint owners, of whom one is the manager, and that all agree to sell, but the managing owner employs the broker to sell the ship generally, is he not employed for all?] When the legal interest is severed each may sue; and it is said in a text-book (a) that, "in case of a joint interest, if two out of three parties have been paid their shares, the third may, in respect of such severance, sue alone for his proportion, for which *Sedgworth v. Overend* (b) and *Garret v. Taylor* (c) are cited. Here, the defendant's letters show

(a) 1 Chitty Plead. 7; 4th edit. 6.

(b) 7 T. R. 279. This was an action in tort, viz. on the case by one part-owner, brought after the other two had in an action of trespass recovered damages for running down their ship.

(c) 1 Esp. Treat. on Nisi Prius, 117. "Three persons had employed the defendant to sell timber for them, in which they were jointly concerned; to two he paid their exact proportion, and they had given him a receipt in full of all demands; the third now brought his action for the remainder, being his share; it was objected that, as this was a joint employment by three, one alone could not bring his action:" but Lord *Mansfield* is reported to have ruled, that when there had been a severance as above stated, one alone might sue. This case seems contradicted by all the other authorities, unless at the time of making the agreement the parties had a several interest, and the promise was made to them severally as well as jointly. As when a man covenants with two or more jointly, yet, if the interest and the cause of action of the covenantees be several and not joint, the covenants shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint; *Eccleston v. Clipsham*, 1 Saund. Rep. 154, n. (1) and (a); and cases there cited. Also *Petrie v. Bury*, 3 B. & C. 353; *Rose v. Poulton*, 2 B. & Adol. 822. The rule is laid down in *Cabell v. Vaughan*, 1 Saund. 291, h. n. (4), with respect to parties suing on contracts not under seal, whether in writing or by parol. "A distinction has been taken between actions of assumpsit and actions of tort; in the former case, if one only of several persons who ought to join, bring the action, the defendant may take advantage of it on non-assumpsit, but in the latter he must plead

the sale of the other shares, and he has taken on himself to sever the plaintiff's share from the rest and keep that only. [*Parke B.* Suppose the defendant's commission had not been paid, or that the money had not been paid over, must the defendant have sued, for his commission, the owners all jointly or each separately? or suppose that the purchaser, without any default of the broker, had not paid the price of the ship, it cannot be argued that the defendant would be entitled to a per centage from each owner on their respective shares. Against whom could he have proved, had a bankruptcy intervened? There was a case of *Break v. Douglas (a)*, in the King's Bench, a short time ago, in which one who had a joint interest in a ship, sought to recover, in an action of assumpsit, from an insurance broker a sum received by him from the underwriters. The court held that the part-owner was entitled to recover from the broker. I differed from them, as I thought it was a joint employment, and the remedy joint by all the owners against him, and by him against them all, so that if either had been insolvent the other remained liable, but the decision turned on some circumstances which, the rest of the court thought, made him a separate agent for each owner.] [*Lord Lyndhurst C. B.* What fact is there here to lead to the conclusion, that it was intended to be a separate contract by the present plaintiff to employ the defendant, and by him to sell the ship for the plaintiff and not for the other part-owners?] The parties might all agree to sell, and to employ one to sell the whole when the entirety of the ship would sell most advantageously. [*Parke B.* That would show them all to have employed the defendant

it in abatement. And this distinction is universally adopted." See cases cited *ibid. Jell v. Douglas*, 4 B. & Ald. 374; also *Webber v. Tivill*, 2 Saund. 121 c.; *Garrett v. Handley*, 3 B. & C. 462.

(a) Not yet reported.

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for that purpose: if there was a joint agreement to sell, there should have been an express agreement to pay the plaintiff his share by the consent of all parties, in order to enable him to sue alone for it.

LORD LYNDEHURST C. B.—If I am employed as the agent of three to receive money, I cannot pay it over without their consent. *Prothero* and *Brown* being the owners who communicated with him on the subject of selling the ship, the defendant paid over the amount of the two shares to them, and for his own security refused to pay the other third to the plaintiff without their consent.

PARKE B.—On this statement there was a joint hiring of the defendant to sell the whole ship. It would have been a breach of his instructions for sale if he had paid over to one his share of the purchase-money without the special concurrence of the rest.

ALDERSON B.—It appears, that the want of such concurrence of all the owners, was the ground of the defendant's refusal to pay.

Rule refused.

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JANE KIRWAN, Administratrix of ANTONY KIRWAN,  
against CLEMENT KIRWAN, MATTHEW KIRWAN, and  
NICHOLAS TUIITE KIRWAN.

**ASSUMPSIT.** The declaration contained counts for money lent, for interest and money due upon an account stated, laying the promises and the statement of the account after as well as before the death of the intestate. *Nicholas T. Kirwan* suffered judgment by default, and the other two defendants respectively pleaded the general issue, and as to so much of the declaration as laid the debt in the life-time of the intestate, the statute of limitations, and a set off. At the trial before the lord chief baron at the sittings after *Hilary* term 1831, a verdict was found for the plaintiff, subject to the following case:—In 1798 *John Kirwan*, the father of the defendants, entered into a partnership with the defendants *Clement* and *Matthew*, as *West India* merchants in *London*, under the firm of *John Kirwan* and Sons. The partnership continued until the death of the said *John Kirwan*, which happened about 1799. Upon his death, the business of the house was continued under the same style and firm by the defendants *Clement* and *Matthew* until 1802, when the other defendant, *Nicholas Tuite Kirwan*, was taken into the firm, which continued to carry on business under the same style and firm of *John Kirwan* and Sons, until the retirement of the defendant *Clement* in *June* 1824. The intestate *Anthony Kirwan* on his retirement a new partner was taken in. At that time a notice of the previous dissolution of partnership was advertised in the *Gazette*, but there was no proof that the plaintiff ever saw that advertisement. No notice was given of the introduction of the new partner; the business was carried on in the old style of *J. K. and Sons*, and the plaintiff continued his account with them under that name. About eleven months after the dissolution, in a letter to one of the partners who had retired, plaintiff said he was aware that after the dissolution he had no claim against him, "but there was nothing to show that he accepted the substituted credit of the new partner in his stead." Held, that the three original partners to whom the loan was made, were not released from their liability.

Mere knowledge by a creditor of the dissolution of partnership, will not release the old partners from their liability to him, though he continue his account with the new firm, unless he appears expressly or by some act to have accepted the substituted credit of the new partnership instead of the retiring partners. *C. M. and N.*, trading under the name of *J. K. and Sons*, were indebted to *A. C.* retired from the partnership, and *M. and N.* undertook to liquidate the concerns. Afterwards *N.* went out of the business, and

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*tony*, the brother of the defendants, at the time the business was carried on by the above three defendants was a creditor of the then firm, and was in the habit of drawing for money against the sum standing to his credit as his occasions required. Between the 30th *January* 1817, and 17th *November* 1827, when the intestate died, accounts were made up by the firm yearly to the 31st of each intervening *December*, entitled Mr. *Antony Kirwan, jun.* in account with *John Kirwan* and Sons. In each of these accounts the intestate was credited with the balance appearing due to him from the statements of accounts of the preceding years, and after the death of the intestate the accounts were rendered to the plaintiff, the widow, by the then firm of *John Kirwan* and Sons; the account in the year 1829 was in the hand-writing of *Nicholas Tuite Kirwan*, and stated a balance to be due of 9288*l.* 4*s.* 2*d.*; for this sum the action was brought. The defendant *Clement* retired from the partnership in *June* 1824, and defendant *Matthew Kirwan* on 31st *December* in the same year, but no public notice of the dissolution was given untill 11th *January* 1825, when the following advertisements were published in the *Gazette* :—

“The partnership hitherto carried on by us the undersigned *Clement Kirwan, Matthew Kirwan, and Nicholas Kirwan*, under the firm of *John Kirwan* and Sons, was this day dissolved by mutual consent, so far as concerns the above-mentioned *Clement*, who retires, leaving the undersigned *Matthew* and *Nicholas* to carry on the business and liquidate the concerns of the present partnership. Witness our hands the 30th day of *June* 1824.

*C. Kirwan.*  
*M. Kirwan.*  
*N. Kirwan.”*

"The partnership hitherto carried on by us the undersigned *Matthew Kirwan* and *Nicholas Kirwan*, under the firm of *John Kirwan* and Sons, was this day dissolved by mutual consent, the said *Matthew Kirwan* retiring therefrom. As witness our hands this 31st day of *December 1824*.

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*M. Kirwan.*

*N. Kirwan."*

At the time that the defendants *Matthew Kirwan* and *Clement Kirwan* retired from the firm of *John Kirwan* and Sons, the debts due from the firm amounted to the sum of 70,000*l.*, and the debts due to the firm amounted to the sum of 73,000*l.*, besides more which were outstanding and to be collected.

After *Matthew* and *Clement* had retired, *Nicholas Tuite Kirwan*, on 1st *January 1825*, took his brother-in-law *Simon Kelly* into the house as partner, the business being still conducted in the name of *John Kirwan* and Sons. At the time the new partnership was formed there was new capital brought into the concern amounting to the sum of 27,000*l.* clear of all the old balances.

The account with the intestate *Antony Kirwan* was carried from the books of the old to the new partnership. The balance was struck annually as before, accounts were rendered to him, and after his death to the plaintiff, his widow. The intestate called at the house for money once or twice a month, and the plaintiff after his death also called for the same purpose several times, and received monies on account. On 25th *November 1825*, the intestate wrote the following letter to the defendant *Clement* :—

"Dear brother,—I received your letter yesterday i

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I was very well aware that on your dissolving partnership with Mr. *Nicholas* I had no further claim upon you." The letter to which it refers was not produced in evidence. Administration of the intestate's estate was granted to the plaintiff, and at the time of the commencement of the action the balance due to her as administratrix was 9333*l.* 17*s.*

The question for the opinion of the court is, whether the plaintiff is entitled to maintain the present action against all the defendants; if she is, the verdict is to stand; if the court should be of opinion that she is not, the verdict is to be set aside and a nonsuit entered.

This case was argued in *Hilary* term 1832, when the court thought it necessary to be informed on the two points hereinafter mentioned, and made a rule for a new trial; the case to be considered binding except as to the state of the debts and credits at the time of the dissolution of the partnership, and except as to the knowledge by the intestate, or the administratrix, of *Kelly* being a partner. Either party to be at liberty to add any facts. The two issues directed by the preceding rule were tried before *Bayley* B. at the sittings after *Trinity* term 1832, and in the *Michaelmas* term following, on the hearing of a rule which had been obtained for a new trial, it was agreed that the following statement should be added to the case: "That there was no evidence of the actual state of the debts and credits of the house at the respective dates of the retirement of *Clement* and *Matthew Kirwan*. A witness who had business transactions with the house, stated he never heard of any embarrassment in the house. The intestate in 1825 knew of the introduction of *Kelly* into the house." The following letter was given in evidence on the trial, and the court were to

determine upon the argument, whether it was to be considered part of the special case :—

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“My dear brother, 4th February 1825.

“I have read your letter to Mr. *Clement* : I sincerely hope that he will not withdraw what he has allowed you. In your's to brother *M. Kirwan* you say that you are much distressed : the idea of your being so, very much affected me. I have inclosed you a bank post bill for 20*l.*, which you will oblige me in accepting. My dear brother, trust in God and he will help you through your afflictions. I intend to give my landlord notice. Mr. *Matthew* having retired from business, I do not know where my property may be placed. Mr. *Matthew* will do all he can to get me 5*l.* per cent., if he does not succeed I shall only have four, which will be 110*l.* less, and I intend to purchase a house near town, if I can meet with one to suit us, to reduce our rent. Let me hear from you soon. I shall be glad to know if you have received the inclosed : also if you have heard from Mr. *Clement*. A. Kirwan.”

This case had been argued before on the question whether *Nicholas Kirwan* and *Kelly* were liable? The Court now intimated that what they wished to hear argued was, whether *Clement* had been discharged, and *Matthew* and *Nicholas* remained liable?

The case was now argued on this point by

*Follett* for the plaintiff. The question is, was there sufficient proof of the defendants' being discharged from their original liability? [*Parke* B. A demand may either be discharged by payment, or by the transfer of the debt from the old to the new firm.] There is no payment; then is there an agreement to accept the security of the two remaining part-

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ners, which would amount in law to a release of the former firm? Even when all the parties consented to transfer the debt of one to the account of another, it is a mere accord, and the debtor is not discharged; *Cuxon v. Chadley* (a). The three defendants constituted the firm at the time the debt was contracted; *prima facie* they are all liable. Has anything taken place to discharge them? There is no payment, no accord and satisfaction, and no one is shown to be substituted for the original parties. First, as to *Kelly*; there is no evidence to show that he is liable—when did he become so? It is suggested that on the account rendered since he came into partnership, *Kelly* might be liable on an account stated. *Clement* went out in *June*, and *Matthew* in *December* 1824; *Kelly* came in in *January* 1825, and an account was rendered in *December* in that year. But no act was done when *Kelly* came in, which amounts to accord and satisfaction; there should have been some evidence that the plaintiff had discharged the retiring parties, and all parties, the retiring partners, and *Kelly* and *Nicholas T. Kirwan*, should have concurred, to make it binding. [*Parke* B. The account is transferred in the books to the credit of *Antony* in the debits of the new concern.] This is not enough, *Devaynes v. Noble* (b). The accounts were not rendered by *Kelly*, but by the other partner in the name of *John Kirwan* and Sons, which was common to the old and new firms. But if *Kelly* is not liable, the other two are not discharged. There was no consideration or better security given to *Antony* to release them. [*Parke* B. The security of one may in law be enough consideration to discharge two, as it may be better than a joint security of two, in cases of outlawry, or survivorship, or bank-

(a) 3 B. &amp; C. 591.

(b) 1 Mer. 540, 568, 570; *Sleech's case*, 576, 579.

ruptcy; and any preferable security is a sufficient consideration. The sole security of a solvent partner is better than the joint security of him and another. If the solvent one dies you would have no remedy against his estate at law; so should the survivor become bankrupt or be outlawed &c.] The Court will not presume the advantage of a sole security unless it is distinctly shown; it is necessary to prove a good consideration for the agreement of the plaintiff to accept a new debtor; *Goff v. Davis* (a), *Lodge v. Dicus* (b), *David v. Ellice* (c). [Parke B. There is a case (d) in the King's Bench that throws a doubt upon those.] There must still be clear and express proof of agreement between the parties, and it is not to be left to inference. There was no act done when either retired, and plaintiff did not know of the account being transferred, and could not have agreed to discharge the partners. [Lord Lyndhurst C. B. The letter of 4 February 1825, rather negatives an agreement; but considering the date of that, and the death of the person, perhaps no inference should be drawn from that. It is not stated on the case that *Antony* had notice of the dissolution. Parke B. The defendant uses that as an acknowledgment that that had passed between the parties which amounted to a discharge. Lord Lyndhurst C. B. There seems to be nothing to affect *Kelly*—that being so, what is there to show that the defendants are not liable? Parke B. You must show what is equivalent to payment, or an agreement to accept the continuing partners in lieu of the others. Lord Lyndhurst C. B. Assuming that to be so in law, have the defendants made out either of those propositions? the onus probandi lay on them.]

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*Coleridge* Serjt. for the defendants. The jury dis-

(a) 4 Price, 200.

(b) 3 B. & A. 611.

(c) 5 B. & C. 196.

(d) *Thomson v. Percival*, Hilary term, 4 Geo. 4.

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tinctly found that the intestate had agreed to take the new firm as his debtor. The creditor of a firm may on good consideration discharge a party going out, and take the remaining persons of the firm, *Thompson v. Percival* (a). Here the liability of the new partner is the consideration. *Kelly* was taken with the concurrence of all. On the dissolution of partnership with respect both to *Matthew* and *Clement*, the account of *Antony* was transferred to the new firm, with the cognizance of *Kelly*. [Lord *Lyndhurst* C. B. After the partnership was formed, the intestate went as usual to the office and received money, but he might not know of the change.] There was a statement of the debts and credits at the time of the dissolution of partnership, and the knowledge of *Antony's* account by *Kelly* must be inferred, and that he agreed to take the debt on him. Suppose *Kelly* had paid money with his own hand, it would have been presumed that he had knowledge—here is what amounts to that: the account is in the books of the new firm, and every act done by them must have reference to their books. If money is paid by a firm of which *Kelly* is a partner, he must be bound by their acts, and must be taken to have knowledge of it. The letter of *February* 4, 1825, after the notice of dissolution had appeared in the *Gazette*, shows a knowledge by *Antony* of the change in the firm. [Lord *Lyndhurst* C. B. He went into the country; though he received money from time to time, there is no evidence that he knew of the change.]

*Follett* in reply. The accounts were not rendered by *Kelly*, but by the partner who remained. There must be clear evidence of an express agreement to change the credit, *Cuxon v. Chadley* (b), or some

(a) K. B. Hilary term, 4 Will. 4.

(b) 3 B. & C. 591.

decided act, as where the party had drawn bills on the new firm, *David v. Ellice* (a); and a mere knowledge of the change is not enough, *Heath v. Percival* (b).

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LORD LYNTHURST C. B.—In this case money was advanced to the three defendants, they are therefore jointly liable for it to the plaintiff, unless they show affirmatively sufficient in law to discharge them. We cannot go out of the statements in the special case. It is said that upon it we may conclude that the plaintiff agreed to take two of the partners as his debtors, and to discharge the third, *Clement*. To support this view two circumstances are relied on; first, that notice of dissolution of partnership had been given, in which it was stated that *Matthew* and *Nicholas* undertook to liquidate the partnership debts; but it was not stated that this notice was communicated to *Antony*. Secondly, the defendants rely on a letter from the intestate to *Clement*, of 25 November 1825, in these terms:—“Dear brother, I received your letter yesterday; I was very well aware that on your dissolving partnership with Mr. *Nicholas* I had no further claim upon you.” Considering this case as a juryman, that letter does not lead me to the conclusion that *Antony* agreed to take the two remaining partners as his debtors. Then did he agree to take *Nicholas Kirwan* and *Kelly*? *Kelly* having transferred his account from the books of the old to those of the new firm, it is argued that *Antony* might have consented to take them as his debtors. But there is nothing which satisfies my mind that he did. As therefore I see nothing which satisfactorily proves a transfer of *Antony*’s debt to the two brothers *Matthew* and *Nicholas*, or to *Nicholas* and *Kelly*, the original debtors remain liable, and the plaintiff must have judgment.

PARKE B.—The law is clear up to a certain point in

(a) 5 B. &amp; C. 196.

(b) 1 P. Willms. 682.

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this case. All the brothers being originally liable, they are to discharge themselves either by payment, or by transfer of their liability by consent of all parties, or by the retiring partner having agreed with the plaintiff to substitute the liability of the continuing partners for that of the old firm. We must see if there is any thing to support the suggestion of payment or of substitution. The facts relied on to support the opinion that a substitution of credit took place, are, first, the advertisement of the dissolution of partnership, and that *Matthew* and *Nicholas* were to liquidate the concerns of the partnership. Secondly, the letter of 25th *November* 1825, from *Antony* to *Clement*. The agreement was, that *Clement* should retire, leaving *Matthew* and *Nicholas* to carry on the business and liquidate the concerns of the partnership. A jury would have decided whether, in pursuance of the duty so cast on them by the agreement, *Matthew* and *Nicholas* had not made some arrangement with the plaintiff to accept a substitution. But it is not stated that the dissolution of partnership was known to the plaintiff, and the notice of one partner going out of a firm does not discharge him, unless that notice is proved to have reached the plaintiff. As to the letter, it is so ambiguous that I cannot come satisfactorily to the conclusion that the plaintiff accepted the liability of *Matthew* and *Clement* only. I concur with my brothers in saying, that on the facts found by the special case we are bound to decide that the defendants have not made out their case. As to any discharge by payment, the case is deficient in any statement from which a settlement of account on *Clement* going out of the firm can be presumed. As for an agreement by which the liability of *Matthew* and *Nicholas* alone should be substituted for theirs jointly with *Clement*, there was evidence upon which a jury might have been satisfied

of that fact, and if they had found it to be so, I should not have said they were wrong; but as I think it doubtful, and my two brothers have a strong opinion, I shall concur with them.

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BOLLAND B.—My judgment is on the facts as stated in the case before me. There appears to have been an agreement, under which the defendants were originally liable to *Antony* when he lent the money. The house having existed for some years, *Clement* retired, and then *Matthew*; on balancing the accounts when *Matthew* withdrew, the house was solvent, with a surplus of 3000*l*. At that time a partnership was formed with *Kelly*, he brought into the firm a capital of 27,000*l*., and might have looked for some adequate capital from *Kirwan*. There is nothing to show that he undertook to answer for the debts owing by the old firm, and the probability is, that he would not incur such a responsibility.

Entries might have been made in the books by which *Kelly* might have protected himself. It is quite uncertain from the words of the case what was the nature of the transfer of the accounts. The account was carried from the old to the new firm, but it is not stated how. Even suppose *Kelly* had taken upon himself a part of the debt, still there is an absence of *Antony's* consent, and the parties in the new firm would not be liable.

GURNEY B. had gone to chambers.

### Judgment for plaintiff (a).

(a) In this case the parties had agreed that the court should decide on the matters of fact set out in the special case, as well as on the matters of law.

END OF EASTER TERM.

**REPORTS OF CASES**  
 ARGUED AND DETERMINED IN THE  
**COURTS OF EXCHEQUER OF PLEAS**  
 AND  
**EXCHEQUER CHAMBER,**  
 IN  
**Trinity Term,**

IN THE FOURTH YEAR OF THE REIGN OF WILLIAM IV.

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**BRIGHT *against* WALKER.**

The plaintiff, assignee of a lease granted for lives by a bishop in right of his see, used a way, without interruption, to and from his premises for more than twenty years over the locus in quo called the *Acre*. The defendant, who was possessed of the *Acre* by assignment

of a similar lease of it, obstructed the way. In an action on the case for this obstruction, Held, first, that since 2 & 3 W. 4. c. 71. the above user conferred no title as against the reversioner, the bishop; nor, secondly, against his lessee, or persons claiming under such lessee during the term.

A declaration claiming a right of way "by reason of" the possession of certain premises, is supported by proof of a reservation of the way in a conveyance of them granted by a tenant for life to the plaintiff.

**C**ASE. The first count stated, that before the committing the grievance &c. the defendant was, and from thence hitherto hath been, and still is, lawfully possessed of a certain wharf, close and premises &c., situate &c., and by reason thereof during all the time aforesaid ought to have had, and still of right ought to have a certain way from and out of the same, into, through, and along a certain close, and from thence into, through, and along a certain road or way unto and into a certain common king's highway, and so from thence back again. It then proceeded to state obstructions by the defendant, by erecting gates in and

across the way claimed. Plea: general issue. At the trial before *Gurney B.* at the summer assizes for *Worcestershire* in 1833, the following appeared to be the facts of the case:—The road claimed led from the plaintiff's house and wharf in *Cliff* meadow through *Eacham* meadow over the locus in quo called the *Acre* into the public highway. *Cliff* and *Eacham* or *Achum* meadows and the *Acre* piece were held on leases for three lives under the see of *Worcester*. In 1809 one *Roberts* having bought the lease of *Cliff* and *Eacham* meadows, built the house now occupied by the plaintiff at the south end of the former meadow near the *Severn*, together with a wharf and brick-kiln. Having a right of occupation way over the *Acre* to go to *Eacham* meadow he made an opening from the latter into *Cliff* meadow, and carried bricks over both fields and over the *Acre*, by the occupation way in question, into the highway. The previous way into *Cliff* meadow was higher up the river, at a place called *Grinley* style. In 1811 the proprietor of the *Acre* put up a gate to interrupt the carriage of the bricks. *Roberts*, however, broke it down, and for more than twenty years the way over the *Acre* was used without further interruption by him and his successor in the occupation of the house and wharf. In 1816, he sold his interest in both meadows, conveying *Cliff* meadow with the house and wharf to the plaintiff, and reserving in that conveyance a right of road from the brick-works across *Cliff* and *Eacham* meadows into the locus in quo, *Eacham* meadow being then sold to another person. In 1832 the lease of the *Acre* having passed into the defendant's hands, he put up a locked gate across the road, for which obstruction this action was brought. The jury found that there had been no grant of the way by the bishop, and that the plaintiff and *Roberts* had enjoyed the way for more than twenty years with-

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out interruption. Verdict for the plaintiff for 5*l.* damages, subject to a motion to enter a nonsuit, on the ground that the use of the way for more than twenty years over lands held by leases for lives could not, even under 2 & 3 *W. 4. c. 71. s. 2.*, confer a right to it against the church in reversion (a). The learned baron gave leave to move for a nonsuit, and

In *Michaelmas* term *Richards* for the defendant, obtained a rule accordingly. [*Bayley* B. All the land being held under leases for lives, would not a grant by the termor confer a right during the continuance of the lease, even against the bishop?]

*Ludlow* Serjt. and *Whateley* showed cause in *Easter* term before *Parke, Bolland, Alderson, and Gurney* Bs. The question whether since stat. 2 & 3 *W. 4. c. 71.* the bishop, as reversioner, can, when he regains possession, be barred by his tenant's acquiescence in the use of this way, does not now arise. The bishop's lease not being shown to have expired, his termor is bound by the uninterrupted user. Nor under stat. 2 and 3 *W. 4. c. 71. s. 2.* is it any answer to uninterrupted user to show the origin of the way to have been more than twenty years ago. By sect. 5. of that statute, if the defendant intends to rely on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, it should be specially pleaded.

(a) Another point was raised by the defendant, that the way was claimed in the declaration as appurtenant to the plaintiff's house and wharf, whereas it appeared to exist by grant of *Roberts*, which was not set forth. *Wright v. Rattray*, 1 East, 377, 381 : and *Kooystra v. Lucas*, 5 B. & Ald. 830, were cited ; but on showing cause *Parke* B. said, that the way might be claimed as appurtenant at the time of which the declaration complained, viz. during the plaintiff's possession of the land under the lease, by reason of that possession, and that the declaration was sufficient. And see *Coryton v. Litheby*, 2 Saund. 112, 115 ; *Barlow v. Rhodes*, ante, Vol. III. 280 ; *Whalley v. Thompson*, 1 B. & P. 371.

*R. V. Richards* in support of the rule. All the lands, in respect of which this way is claimed, being leasehold for lives held under the see of *Worcester*, it is clear that before the late statute no user would have created a right against the ecclesiastical reversioner. [*Parke B.* It might against the lessees.] The defendant claims under the lessees of the bishop. Before the late act, user of a way, even by the public, for more than twenty years, if taking place during the occupation of a tenant, was held not to affect the rights of even a lay reversioner; *Wood v. Veal* (a), *Daniel v. North* (b). In *Runcorn v. Doe in Error* (c) Lord *Tenterden* laid it down, that adverse possession is not in general evidence against an ecclesiastical person, unless against the same person who has submitted to that possession. In *Barker v. Richardson* (d) windows looking over land then glebe had existed without interruption for more than twenty years during the life of one incumbent; but it was held, that as he being only tenant for life without seisin of the inheritance, could not grant an easement; the long enjoyment conferred no right of action for stopping up the windows. In *Wall v. Nixon* (e) evidence of user for twenty years of a head stock to pen up a rivulet was held no sufficient evidence of a grant to warrant its continuance, to the injury of church land. Then the statute has not altered the previous law; for the plaintiff not claiming right to this way, except by user during all this period, should have shown that the lease from the bishop had continued to exist.

[*Parke B.* The question upon the recent statute is of considerable importance, we will therefore take time to consider it.]

(a) 5 B. &amp; Ald. 454.

(b) 11 East, 372.

(c) 5 B. &amp; Cr. 696.

(d) 4 B. &amp; Ald. 579.

(e) 3 Smith's R. 316.

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Afterwards, in this term, the judgment of the court was delivered by

PARKE B.—This was an action on the case for obstructing a way to the plaintiff's wharf, which was tried before my brother *Gurney* at the last summer assizes at *Worcester*. A verdict passed for the plaintiff, with liberty to move to enter a nonsuit, on two grounds: first, that the plaintiff's title to the right of way was not made out by the evidence; and, secondly, that it was not properly described in the declaration. On showing cause, the second objection was disposed of by the court, and the only point to be now considered is, whether the right of way was established. The way claimed was from a wharf in a close called *Cliff* meadow, through *Eacham* meadow, over the locus in quo called the *Acre*, where the obstruction took place, into a public highway.

*Cliff* and *Eacham* meadows were held under the Bishop of *Worcester* by a lease for three lives, granted in 1805 to Alderman *Davis*. In 1809 *Roberts* purchased the leasehold interest from *Davis*, and began to make bricks in *Cliff* meadow, and carried them through *Eacham* meadow and the *Acre* into the highway.

In 1811 *Dalton*, the then occupier of the *Acre*, and the assignee of a copyhold lease for four lives under the bishop, of the close called the *Acre*, put up a gate to obstruct *Roberts* in carrying bricks. *Roberts* broke it down, and he and the plaintiff, who claimed under him, continued to carry bricks over the *Acre* without interruption for more than twenty years, when defendant claiming as assignee of the bishop's lease under *Dalton*, obstructed the way, and for that obstruction the action was brought.

No proof was given on either side that either of the original leases had been surrendered, and therefore the case must be considered as if both had continued to the time of the obstruction.

The jury found, first, that they would not presume any grant of right of way by the bishop; and secondly, that the plaintiff and *Roberts* had actually enjoyed the way without interruption for more than twenty years. And the only question is, whether such an enjoyment gives to the plaintiff a right of way over the defendant's close, so as to enable him to maintain this action? That depends upon the construction of the act 2 & 3 W. 4: c. 71. and particularly sect. 2.

For a series of years prior to the passing this act, judges had been in the habit, for the furtherance of justice and for the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years by analogy to the statute of limitations. Such presumptions did not always proceed on a belief that the thing presumed had actually taken place; but as is properly said by Mr. *Starkie*, in his excellent *Treatise on Evidence*, vol. ii. p. 669, "A technical efficacy was given to the evidence of possession beyond its simple and natural force and operation;" and "though in theory it was mere presumptive evidence, in practice and effect it was a bar." And that learned author observes, in a note, "that so heavy a tax on the consciences and good sense of juries, which they were called on to incur for the sake of administering substantial justice, ought to be removed by the assistance of the legislature."

The act in question is intended to accomplish this object, by shortening in effect the period of prescription, and making that possession a bar or title of itself which was so before only by the intervention of a jury. The title of the act is, "for shortening the time of pre-

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scription in certain cases;" and it recites that "the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of *England* in many cases considered to include and denote the whole period of time from the reign of king *Richard I.*, whereby the title to matters which have been long enjoyed, is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice." It then proceeds to enact, in the second section, that "no claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or to the use of any water to be enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the *Duchy of Lancaster*, or of the *Duchy of Cornwall*, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto, without interruption, for a full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

In order to establish a right of way, and to bring the case within this section, it must be proved that the claimant has enjoyed it for the full period of twenty

years, and that he has done so "as of right;" for that is the form in which by sect. 5. such a claim must be pleaded, and the like evidence would have been required before this statute to prove a claim by prescription or non-existing grant. Therefore if the way shall appear to have been enjoyed by the claimant not openly, and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done; if he shall have occasionally asked the permission of the occupier of the land, no title would be acquired, because it was not enjoyed "as of right." For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed "as of right" the "easement," but the soil itself. So it must have been enjoyed "without interruption." Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim arising by custom, prescription, or grant, would now be defeasible; and therefore it may be answered by proof of a grant or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. So far the construction of the act is clear, and this enjoyment of twenty years having been uninterrupted and not defeated on any ground abovementioned, would give a good title; but if the enjoyment take place with the acquiescence or by the laches of one who is tenant for life only, the question is, what is its effect, according to the true meaning of the statute? Will it be good to give a right against the see, and against those claiming under it by a new lease? or only as against the termor and his assigns during the continuance of the term?

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or will it be altogether invalid? In the first place, it is quite clear that no right is gained against the bishop: whatever construction is put on the seventh section, it admits of no doubt under the eighth. This section provides, "that when any land or water upon, over, or from which any such way or other convenient water-course or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before-mentioned during the continuance of such term, shall be excluded in the computation of the said period of forty years (*viz.* in sect. 2. mentioned), in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof. It is quite certain that an enjoyment of forty years instead of twenty, under the circumstances of this case, would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer period as against the bishop, it certainly must from the shorter. Therefore there is no doubt but that possession of twenty years gives no title as against the bishop, and cannot affect the right of the see.

The important question is, whether this enjoyment, as it cannot give a title against all persons having estates in the locus in quo, gives a title as against the lessee and the defendant claiming under him, or not at all. We have had considerable difficulty in coming to a conclusion on this point, but on the fullest consideration we think that no title at all is gained by a user, which does not give a valid title against all, and permanently affect the fee.

Before the statute this possession would indeed have been evidence to support a plea or claim by non-existing grant from the termor in the locus in quo to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. (a). But we think that since the statute such a qualified right is not given by an enjoyment for twenty years. For, in the first place, the statute is "for the shortening the time of *prescription*," and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all; for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. In the next place, the statute no where contains any intimation that there may be different classes of rights qualified and absolute, valid as to some persons, and invalid as to others.

From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good against any one, and therefore not against the defendant. This view of the case derives confirmation from the seventh section, which is as follows:—"Provided also, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pend-

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(a) Sec 2 & 3 W. 4, c. 71, s. 5.

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ing, and which shall have been diligently prosecuted until abated by the death of any party or parties there-to, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible:" (*viz.* by sect. 2.) This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim to the way) is *tenant for life*; and unless the context makes it necessary for us, in order to avoid some manifest incongruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. That construction does not appear to us to be at variance with any other part of the act, nor to lead to any absurdity. During the period of a tenancy for life, the exercise of an easement will not affect the fee; in order to do that there must be that period of enjoyment *against* an owner of the fee.

The conclusion, therefore, at which we have arrived is, that the statute in this case gives no right from the enjoyment that has taken place; and as sect. 6. forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other by the proof of possession alone. Of course nothing that has been said by the court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other proved by the deed itself, or upon proof of its loss, by secondary evidence; nor prevent the jury from taking this possession into consideration, *with other circumstances*, as evidence of a grant, which they may still find to have been made, if they are satisfied that it was made in point of fact.

We are therefore of opinion that in the present case the plaintiff is not entitled to recover, and that a nonsuit must be entered.

Rule absolute.

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In the matter of the Estate and Effects of JOHN  
WILKINSON, deceased.

**JOHN WILKINSON** by his last will dated 20 April 1831, bequeathed as follows:—After all my just debts and funeral expenses are paid, my will and pleasure is as follows:—In case my beloved wife, *Mary Wilkinson*, should survive me, that my executors hereafter named do pay my beloved wife 300*l.* per annum, by even and quarterly payments, during her natural life. Item, I give and bequeath to my son *Jacob Wilkinson*, shop-keeper at *Southgate, Middlesex*, all the stock in trade, also my freehold estate, No. 8, *Watling Street*, let at 300*l.* per annum, with the rents of my two houses at *Highbury Place, Islington*, Nos. 13 and 20. during the term of the leases, also my silver cup. To my daughter, *Jane Smith*, now residing in *Castle Street, St. Martin's Lane*, 2000*l.* and the house I now live in 32, *Ebury Street, Pimlico*, formerly 5; also my silver waiter. Item, to the treasurer for the time being of the *Wesleyan Stranger's Friend Society*, for visiting the sick and poor at their own houses, 100*l.* To the treasurer for the time being of the *Dispensary in Sloane Square*, 100*l.* To the treasurer for the time being of the *Westminster Hospital*, 100*l.* Item, to *John Forrest*, son of *George Forrest* (yeoman), the sum of 19*l.* 19*s.* Item, to *James Brothers*, son of *James Brothers* (yeo-

A will directed executors to lay out the residue of the personalty in the funds, and divide the interest "among poor pious persons, male or female, old or infirm, in 10*l.* or 15*l.*, as they should see fit." Held, first, that the executors could not be called on to pay legacy duty as beneficial legatees; and secondly, that "poor and pious persons" are not benefitted by the bequest as a class, but that each individual selected by the executors was the person so benefitted, and was consequently liable to pay the duty when the sum received should exceed 20*l.*, such duty to be then retained by the executor accordingly, after being calculated according to the party's propinquity in blood to the testator.

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man), the sum of 19*l.* 19*s.* As to my wearing apparel, linen, household furniture of every description, my son and daughter may divide or sell, as they please. Finally, after my just debts and legacies are paid, my will and pleasure is, that all my money in the banker's hands, bills of exchange, &c. &c. be collected into cash and laid out in the funds in the Bank of *England*, where I now have considerable property; and that my executors hereafter named, and their heirs and assigns, do receive the interest thereof at the Bank half yearly, and "divide it amongst poor, pious persons, male or female, old or infirm, in 10*l.* or 15*l.*, as they see fit, not omitting large and sick families, if of good character."


By a codicil, dated 27th *July* 1833, the testator, after several bequests and legacies, directed that the legacy duty payable in regard of the several legacies and bequests in his will, and the codicil mentioned, should be charged upon and paid out of his personal estate, and thereby confirmed his said will.

The executors having paid legacy duty on every bequest but the last, to "poor pious persons," a rule was obtained under 42 *G. 3. c. 99. s. 2.* calling on them to pay legacy duty on that also.


*Stephen Serjt., Dixon and Gurney* showed cause. The plain meaning of the third part of the schedule annexed to 55 *G. 3. c. 184.* shows that legacy duty is not here payable. It is headed thus—Legacies and Successions to personal or moveable estate upon intestacy, where the testator, testatrix, or intestate, shall have died after 5 *April* 1805. For every legacy specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th day of *April* 1805, either out of his or her personal or moveable estate, or out of or

charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st day of *August* 1815. Also for the clear residue (when devolving to one person), and for every share of the clear residue (when devolving on two or more persons) of the personal or moveable estate of any person who shall have died after the 5th day of *April* 1805, after deducting debts, funeral expenses, legacies, and other charges first payable thereout, whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy, where such residue or share of residue shall be of the amount or value of 20% or upwards, where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st day of *August* 1815. And also for the clear residue (when given to one person), and for every share of the clear residue (when given to two or more persons) of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of by any will or testamentary instrument of any person who shall have died after the 5th day of *April* 1805, (after deducting debts, funeral expenses, legacies, and other charges, first made payable thereout, if any), where such residue or share of residue shall amount to 20% or upwards, and where the same shall be paid, retained or discharged after the 31st day of *August* 1815. The several amounts of duty differing when the legacy or residue is for benefit of a child, or any descendant of a child of the deceased, as well as of a father, mother, brother or sister, or descendant of either, or stranger in blood, are then subjoined. Next, all gifts of an-

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nuities, or by way of annuity, or of any other partial benefit or interest out of any such estate or effects, are to be deemed legacies; and where a legatee shall take two or more distinct legacies as benefits, together amounting to 20%, they are chargeable, though each separately is under that sum. Three exceptions follow in favour of legacies &c. to or for the benefit of the husband or wife of the deceased, of any of the royal family, and of certain specific legacies to bodies corporate, or other public bodies exempted by 39 G. 3. c. 73. from the payment of duty.

All these enactments show that legacy duty was only intended to attach on the beneficial interests taken by legatees, and on them individually in respect of their beneficial interests; or the exemptions and variations in the scale of duty would be without meaning. Though the earlier part of the schedule may seem to impose the duty generally on the legacies, the subsequent clauses limit its operation, and show that the only cases within the words or contemplation of the act are those where it may be affirmed that a legacy or residue is to be taken for the benefit of some individual who is either related to the deceased or not. Now, as under the present bequest no individual can take beneficially more than 15%, the present case is wholly out of the operation of the schedule, which by the enacting part which imposes the duty, limits the description that the legacy shall amount to 20% or upwards. Had this unanimity been conferred by way of exemption, the parties claiming it must have brought themselves within it, but it here clearly lies on the crown to show that the legacy is of 20% amount, and so chargeable with duty. What individual person, taking a beneficial interest, is to pay duty here, except it be the "poor, pious person" to whom the trustees may think fit to allot a share of the fund bequeathed?

No scale of duty provided by the schedule can otherwise be applied. A remote descendant of a brother or sister of the deceased might be fixed on as an object of his posthumous bounty ; and if so, he would be entitled to it on payment of only 3*l.* per cent. legacy duty. If, however, it is said the “ poor, pious persons ” to be fixed on by the trustees are to be considered and taxed as a class, they will, as strangers in blood, pay 10*l.* per cent., amounting in this case to 3000*l.* ; but that would wholly disregard the distinction intended to be preserved between persons of the blood of the testator and strangers to him in blood. Besides, to tax them as a class would be to tax the fund and not the individuals, for though the trustees would have less to distribute after the 10*l.* per cent. had been paid by them out of the fund, the objects of their selection might receive the same amounts. Can, then, a legacy itself be taxed without adverting to the degree of relationship to the deceased in which the person to take the benefit may stand ? [*Alderson* B. In the instance of the bequest to the *Westminster* Hospital, who would take the beneficial interest ?] If legacy duty be payable on a bequest to a public body or institution not corporate, as to any hospital, museum or library, is a bequest for the benefit of the body which takes the beneficial interest ? whereas, here, the beneficial interest being by the terms of the will to be taken by ulterior persons, the tax must fall on them. They are in truth the legatees, though when selected by the trustees ; whereas, though a patient in a hospital receives benefit from being cured there, the character of legatee cannot be ascribed to him. Corporate bodies are strictly liable to duty. How can the trustees, distributing a fund to others, who receive the ulterior benefit, be liable to this duty ? If they could, then, if they were sons of the deceased, as is here the case

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with one of them, a smaller amount of duty would be payable, or if the trustee was a wife, no duty at all; though all the parties ultimately to be benefitted might be strangers in blood to the testator, and therefore clearly intended by the act to pay 10% per cent. on any legacy amounting to 20%. To charge the trustees, who take no beneficial interest, is to charge the fund in the aggregate, for which there appears no authority under the act. But if these "poor pious persons" are not to be considered as taking a beneficial interest as legatees under the will, it will follow that there are none who do. Then no legacy duty will be payable; for if there can be a case where no individual takes a beneficial interest, it is not within this act. That may have been the intent of the legislature; as in such a case the legacy is to that public whose establishments the duty is intended to support. If it is said that 15% is not necessarily the maximum to be received, because that gift may be repeated yearly, it may be answered, that trustees for the crown must make out affirmatively that this is a legacy amounting to 20%, and not rest on a supposed case that it might at a future time amount to that sum. At all events, it would only attach in the particular case when it arose, if indeed under this will the trustees could so dispose of the fund. But 36 G. 3. c. 52. in stating what shall be deemed legacies within the act, provides by s. 7. that any gift by any will or testamentary instrument of any person dying after the passing of this act, which shall by virtue of such testamentary instrument have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a "legacy" within the intent and meaning of this act, whether the same shall be given by way of annuity or in any other form;

and then, after directing how the value of annuities shall be calculated, and the way in which the duty thereon shall be charged, enacts by s. 11. that if any benefit shall be given by any will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such person or made chargeable therewith, or if the amount or value of any benefit given by any will or testamentary instrument cannot by reason of the form and manner of the gift be so ascertained that the duty can be charged thereon under any other directions herein contained, then and in every such case such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with answering the same. Now that section seems closely adapted to meet the difficulties of this case. For here, the amount or value of the bequest "can only be ascertained from time to time by the actual application of the fund," so as to charge the duty accordingly.


Ex parte Franklin (a) was decided by the Vice-Chancellor on petition, the question having arisen incidentally on the administration of a testator's estate. The testator there by will gave and bequeathed to the poor of *Haddenham* a legacy of "50*l.* per annum for ever, to be laid out at *Christmas*, in bread, and distributed by the minister and churchwardens to the most needy objects in the parish," and charged his leasehold and personal property with it. The poor of *Haddenham* consisted of 820 persons, so that no one person could in a year receive 2*s.* in bread. When argued that it must go

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to them as a class, the Vice-Chancellor held that it was a legacy on which the duty ought to be paid. He said, that though not expressed to be given to any individual, it was in effect given to the executors in such a manner as that they held it in trust for certain purposes, and that the mode in which it was given did not admit of its being ascertained what sum or precise benefit any one individual would have in the legacy. He afterwards said, that it was in effect a gift for charitable purposes, observing that the legislature seemed to have supposed that in cases where the degree of relationship could be ascertained, there should be a progressive charge; but that in the case before him the legacy was so given that kindred seemed to be out of the question, and that here was a complete sum of 50*l.* for charitable purposes. In other words, he held the duty chargeable on the fund, not on the individuals. That construction, it has been submitted, cannot be the intention of the act. He further said, "with regard to legacies given to charities, there has been by the general assent of mankind, a construction put on the statutes so as to charge such bequests with legacy duty. When legacies have been given to treasurers of hospitals and other charitable institutions, it has been considered as a matter of course to pay the duty." That may be so, for the hospital or charitable institution, particularly if corporate, being a body already combined for and interested in the attainment of a particular object, is the beneficial legatee of a bequest given for that object; so in the case then sub judice the parish might well be considered as a body taking beneficially, being benefitted by the relief of their poor, whom they were bound by law to maintain. But 36 G. 3. c. 52. s. 7. was not then adverted to, which alone invalidates that decision. Nor can any inconvenience arise from postponing the payment of legacy

duty till the benefit to each legatee amounts to 20*l.*, for by 36 G. 3. c. 52. s. 27. 28. & 29. no legacy is to be paid without a receipt duly stamped; *i. e.* the receipt cannot be stamped till the duty is paid.

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The *Attorney-General* (Sir John Campbell), *Amos* and Sir *George Grey*, for the crown. The right to legacy duty accrues under 36 G. 3. c. 52., though its amount has been since increased. That act provides by s. 6. "That the duties hereby imposed shall in all cases in which it is not hereby otherwise provided, be accounted for, answered, and paid by the person or persons having or taking the burthen of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons." So that when the executor retains for the benefit of any other he is to pay legacy duty. The legislature could not have intended that the poor persons should pay the legacy duty and give stamped receipts; and the section quoted, as to retainer by an executor, avoids any such difficulty. Either as legacy or residue the 3000*l.* must be retained by the executors for the benefit of their ultimate appointees. By 55 G. 3. c. 184. duty is to be paid on every legacy of 20*l.* given by any will, either out of personal estate &c., and which shall be paid, delivered, *retained*, satisfied, or discharged after 31 August 1815, and upon "the clear residue, when devolving to one person, and every share of the clear residue when devolving to two or more persons of the personal estate," &c. whether

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the title shall accrue by testamentary disposition or on intestacy, "where such residue or share of residue shall be of the amount of 20*l.* or upwards, and where the same shall be paid, delivered, *retained*, satisfied, or discharged after 31 *August* 1815." Then, where the residue is of 20*l.* value, and retained by the executor after 31 *August* 1815, duty is to be paid. This residue retained has been admitted to exceed 30,000*l.*

Stat. 39 G. 3. c. 73. was an act for exempting from payment of legacy duties *certain specific legacies* given to bodies corporate and other public bodies and societies, enumerating books, prints, gems, &c. Till that act, specific legacies of these articles to such bodies would have been liable to duty as they now are if of articles not so enumerated, or if pecuniary; yet no beneficial interest is taken by any individual. Then the entire sum bequeathed to the charitable objects must be considered as the legacy, and not the smaller parts into which it is to be divided in order to distribution. On this principle has legacy duty been paid on the bequests in this will to the treasurer of the *Wesleyan* Stranger's Friend Society, for visiting the sick and poor at their own houses. It is said, that if a legacy be given to a person without his taking a beneficial interest, it is a *casus omissus*; but in the instance above mentioned, as well as the other bequests to charitable institutions on which the duty has been paid, the argument equally attaches. The treasurer of the *Wesleyan* Society takes no beneficial interest, and no one else could sue as legatee. Here, had the bequest been to any named persons, of sums under 20*l.*, they would have been legatees, who might have called on the executors to pay the amount, but as the executors here hold every thing at their discretion, the person who takes the bounty takes by their gift, not by the will, and they only can call themselves legatees. The

uncertain amount of the residue makes no difference. It may be taken as a legacy of 30,000*l.* to the executors to be divided "among poor and pious persons, male or female, old or infirm, in 10*l.* or 15*l.*, not omitting large and sick families, if of good character." The executors would then take the whole sum to be distributed as they saw fit. Suppose no limitation as to the 10*l.* or 15*l.*, or that the sums to be distributed had been fixed at a sum above 20*l.*, still the persons receiving them by gift of the executors would not be legatees under the will, or liable to pay the duty. The executors who *retain* the fund bequeathed must pay it without deducting it from the sums given. Then, if the poor and pious persons would not, in the case put, be liable to legacy duty, not being to be considered as legatees, then they cannot be considered such in a case where they take less than 20*l.* and no legacy duty is payable. The persons who retain the fund bequeathed have patronage in disposing of it according to the direction in the will. [*Parke* B. If the executors are to be treated as legatees, what rate of duty is the son of the deceased to pay? You say he retains for the use of strangers; that is, that it is not a legacy to the executors, but to the poor as a class.] If so construed, the executors retain for the poor as a class. [*Alderson* B. Some of that class might be relations of the testator.] The amount of duty would vary in such cases. [*Parke* B. The interpretation you would give the act is as if instead of the last description of legacy mentioned in it being to a person "in any other degree of collateral consanguinity to the deceased, or to or for the benefit of any stranger in blood to the deceased," it were "to any other person or persons soever," that is, to any others than those before alluded to.] That seems to have been so considered in *Ex parte Franklin*, where it was held that it was not necessary to wait to

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see whether the object of bounty was to be a relation or not before the legacy duty was payable. That decision did not turn on the benefit to the parish, nor was it the case of a body corporate, but it was treated as analogous to that of a bequest to a hospital and the usage in such a case. To wait for legacy duty in the latter case till a patient had received 20*l.* benefit from the bequest, or in the present, till the trustees select the same person on two occasions, so as to receive 20*l.* in all, would be inconvenient; and it would be much more reasonable to treat it as a general legacy for charitable purposes, within the usage sanctioned in *Ex parte Franklin*.

Besides, under the terms of the will, a legacy of the residue is constituted, and the duty would attach on the whole corpus of it without considering the legacy as divisible or divided into as many portions as there are persons selected by the executors to take a bounty under it. Now, section 6. of 36 G. 3. c. 52. clearly establishes a difference between the payment by executors of a legacy to a legatee, and a retainer by them of legacies for the use of others. Then sect. 27. shows that this is not a case in which the receipts there directed to be taken by executors on paying legacies to legatees could not have been intended to be taken by the executors (a). This residue therefore must be taken as one undivided legacy to the executors, subject to certain directions as to the disposal of it by them, without marking out any individual to whom they are to pay any part of it. [*Parke B.* You say that it is not to be considered as a legacy to the individuals who receive the money, but that they take as by the gift of the executors. The question remains whether this is a "legacy" within the act; whether a legacy to a class

(a) See also s. 5. & 6. and s. 35.

of this sort falls within the last description in the schedule, "to persons in other degrees of consanguinity or strangers in blood?" If, instead of those words, the act had run, a legacy "to any other person or persons whomsoever," a legacy to such a class would have been clearly within it.]

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Cur. adv. vult.

The judgment of the court was now delivered by

PARKE B.—The question which arises in this case is, whether the executors are liable to pay the duty on this legacy, and to what amount. By 36 *Geo. 3. c. 52. s. 6.*, the duties imposed by that statute are to be accounted for, answered, and paid by the persons taking upon themselves the execution of the will, upon retainer for their own benefit, or the benefit of any other person or persons, of any legacy, or the residue of any personal estate, or any part of such residue; and also upon delivery, payment, or other satisfaction of any legacy, &c. And by 55 *Geo. 3. c. 184.*, schedule, part 3, the duties therein mentioned are imposed upon every legacy or share of residue paid, delivered, retained, satisfied or discharged. But it is obvious that the executors are to be accountable for no duties except those which are specifically imposed by the act of parliament, and the question is, whether any and what duty is imposed upon such a legacy as this.

In order to determine this question it is necessary to take a short review of the different acts of parliament on this subject. The first statute imposing duties on legacy receipts, was the 20 *Geo. 3. c. 28.*, which enacted that a duty should be paid on every receipt for any legacy or part of a personal estate divided by force of the statute of distributions, or the custom of any

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province or place. The 23 *Geo.* 3. c. 58., and 29 *Geo.* 3. c. 51., increased the amount of those duties, adopting similar language. The 36 *Geo.* 3. c. 52. enacted, that these duties should cease, and repealed so much of the before-mentioned statutes as related to them, and proceeded to impose fresh duties, on the same principle and in nearly similar terms, except as to amount, as are contained in part 3 of the schedule to 55 *Geo.* 3. c. 184., the statute now in force. The 7th section provides, "that any gift by any will or testamentary instrument of any person dying after the passing of that act, which shall by virtue of such will or testamentary instrument have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity or in any other form."

Then follows, after others, this important clause. Sect. 11. "If any benefit shall be given by any will or testamentary instrument, in such terms that the amount or value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith; or if the amount or value of any benefit given by any will or testamentary instrument cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained; then and in every such case such duty shall be charged on the several sums of money or effects, which shall be applied from time to time for the purposes directed by such will or testamentary instrument as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes, or charged with an-

swering the same." The stat. 39 *Geo. 3. c. 73.*, exempts certain specific legacies which shall be given or bequeathed, to or in trust for any body corporate, whether aggregate or sole, or to the society of *Serjeant's Inn*, or any of the inns of court or chancery, or any endowed school, in order to be kept and preserved by such body corporate, society or school, and not for the purpose of sale ; it also exempts a certain legacy to the trustees of the *British Museum*. The statute now in force is the 55 *Geo. 3. c. 184.*, and sched. 3. part 2. provides, that for every legacy, residue, or share of residue, of the amount or value of 20*l.* and upwards, where any such legacy, residue, or share of residue, shall have been given to or for the benefit of a child, a duty shall be paid of one per cent. ; an increased duty for more distant relatives. " And where any legacy &c. shall have been given to or for the benefit of any person in any other degree of collateral consanguinity than above described, or to or for the benefit of any stranger in blood, then a duty after the rate of 10*l.* per cent." And the schedule provides that all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, shall be deemed legacies within the intent of this act. And there is an exception of legacies which were exempted from duty by the 39 *Geo. 3. c. 73.* Considering the provisions of these statutes together, it seems clear, in the first place, that the legislature intended to subject all legacies above 20*l.* in value, to a duty, whether given to individuals or to bodies corporate, or societies. For the statutes prior to 36 *Geo. 3.* in terms comprise all legacies : and though that statute, after enumerating those to persons in different degrees of consanguinity, mentions only legacies which shall be given or shall pass to or for the benefit of any person in any other degree of collateral consanguinity, or of any stranger in blood, and not all

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other legacies ; yet taken in conjunction with the 39 *Geo. 3.*, it clearly means to comprise not merely legacies to individuals, but to bodies corporate and societies. In the second place, it appears to be equally clear, that the persons, bodies corporate, or societies, who take the beneficial interest in the legacy, that is, those who actually receive the benefit, are ultimately to pay the duty. And in the third place, that any benefit given by will which shall by virtue of the will be satisfied out of the personal estate, is a legacy within the meaning of this act. Now, in this case, who are the persons who take the beneficial interest in this legacy of the residue ? They must be either, first, the executors themselves ; or, secondly, the individuals selected by them ; or, thirdly, the whole body of poor and pious persons out of whom the selection is to be made. The gift must enure to the benefit of one of the three descriptions of persons, for no others can be suggested ; and there can be no case of a legacy under a will which is not beneficial to some persons. First, The executors have no beneficial interest in the legacy ; their duty is simply to divide the annual interest among such poor and pious persons as they think fit in sums of 10*l.* and 15*l.* each. They can make no other appropriation or disposition of the money. It appears to us, therefore, that they cannot be charged as beneficial legatees.

It remains therefore to consider whether the individuals actually benefited, or the whole body of persons that may be benefited, are the beneficial legatees ? It appears to us, that all poor and pious persons whatsoever cannot be considered as a society, or body of persons, or class, taking the benefit of this legacy. The whole body has no power or control over the fund, nor has any trustee or agent for them such power or control : nor has any individual falling under the description of poor and pious, any right whatever to any

portion of it. All he has is the chance of being nominated as a fit person to receive part of the money. We cannot think that these persons are a body, taking as such the beneficial interest in the legacy; and we must therefore hold that the individuals selected are the persons who take a benefit under the will, and are consequently liable to the duty, in those cases in which duty attaches; and the clause of 36 *Geo. 3. c. 52. s. 11.* above referred to, seems to us to be exactly applicable to this case. The result is, that such individuals will be liable to the duty where the sum received by each exceeds 20*l.*, and then and not till then the executors will be accountable and bound to retain the duty according to the rate applicable to each person who receives the testator's bounty.

By our present decision we do not mean to question the legality of the practice of imposing the highest rate of duty on bequests to corporations, or societies established for charitable purposes, or to individuals in trust for such societies. Legacies of this description are contained in this will, and they are cases in which the entire control and power over the legacy is vested in the corporations or societies therein named, or in those who have the governing authority over them. The legacies go into their general fund. On such cases the corporation or society may not improperly be considered as taking the entire beneficial interest. The case of *Ex parte Franklin* (a), the authority of which has been pressed upon us, is more difficult to distinguish from the present, and we are not sure that it can be satisfactorily distinguished. That was a legacy to the executors in trust for the poor of a particular parish, and it may possibly be contended that the poor of one parish is in the nature of a corporation

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(a) 3 Y. &amp; J. 544.

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or society of persons, and that they took the legacy in that character. It is however, in our opinion, doubtful whether such a bequest can be properly compared to a legacy to a charitable institution; and the difficulty which occurred to the Vice-Chancellor, in the way of considering this as a legacy to individuals, namely, that it was impossible to ascertain at the time of the gift what precise benefit any individual would have in that legacy, is certainly removed by a reference to the clause in 36 *Geo. 3.*, which clearly shows that bequests on which it was impossible to ascertain what benefit was taken, until the money was applied, are yet legacies to individuals, and liable as such to duty under the act. The result is, that in our opinion, formed not without some difficulty and doubt, the rule must be discharged, and that the executors cannot be called upon to pay the duty on the whole of the residue.

Rule discharged.

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IN THE EXCHEQUER CHAMBER.

CHAMBERS, the Elder, *against* BERNASCONI and Others.

(In Error from the Court of Exchequer.)

Before Lord DENMAN C. J. of K. B.—TINDAL L. C. J.

—LITTLEDALE, TAUNTON, and PATTESON Justices of K. B.—PARKE, GASELEE, and BOSANQUET Justices of C. P.

ASSUMPSIT for money had and received. Plea, general issue. This action was brought to try the validity of a commission of bankrupt issued against the plaintiff on 19 *November* 1825, under which the defendants had acted as assignees. The plaintiff, a trader, had been arrested at his residence, *Maida Hill, Paddington*, in *June* 1825, after being denied to the officer. He was again arrested on 9 *November* in that year, *viz.* about two months after the new bankrupt act, 6 *Geo.* 4. c. 16. had come into operation; and whether the second arrest took place at *Maida Hill*, or in *South Molton Street*, became the material question in the cause, in order to establish or disprove the specific act of bankruptcy relied on in support of the commission, *viz.* the keeping house by the plaintiff, and denying himself to creditors at *Maida Hill*. The plaintiff was interested in proving the arrest of 9 *November* to have taken place in *South Molton Street*, at a house which was not his residence, but had been taken by the committee appointed to investigate his affairs, where he attended them daily. On the other hand, the object of the defendants was to show that the plaintiff

A written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer, contemporaneously with effecting the arrest, sent immediately to the sheriff's office, and there filed in the course of business, is not admissible evidence of the place at which the arrest took place after the death of the officer, in an action between third persons.

Depositions taken before commissioners of bankrupt, and inrolled by the assignees according to 6 *Geo.* 4. c. 16. s. 96. are not evidence against them in an action brought to dispute the commission, by disproving the act of bankruptcy on which it is founded.

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was arrested on the same 9 November 1825, at his residence at *Maida Hill*, after being denied to the officer. The case was first tried before Lord *Lyndhurst* C. B., at the sittings after *Hilary* term 1831, when the plaintiff had a verdict. A rule for a new trial having been afterwards made absolute, [see Vol. I. 335,] the case was tried again before Lord *Lyndhurst*. For the plaintiff certain depositions were offered in evidence, viz. depositions of *Wright*, the sheriff's officer, who had on both occasions arrested the plaintiff, and of *Fletcher*, a clerk to the plaintiff, employed at the office in *South Molton Street* on 9 November 1825, both since deceased, taken before the commissioners of bankrupt, and showing the arrest on the latter day to have taken place in *South Molton Street*. The under-sheriff for *Middlesex* was then called, and produced from the sheriff's files the writ on which the arrest of 9 November had taken place; and having stated, that by the course of the office, every bailiff making an arrest was required immediately afterwards, and before taking a bail-bond, to transmit to the office a memorandum or certificate of the arrest, and that for the last few years an account of the place where the arrest took place had been also required from him, produced from the same files a paper writing or certificate which was annexed to the writ, and purported to be signed by the officer *Wright*, proved to be since deceased, and addressed to the witness as under-sheriff of *Middlesex*.

"9 November 1825.

"I arrested *Abraham Henry Chambers* the elder only (a), in *South Molton Steet*, at the suit of *William Brereton*.

"*Thomas Wright*."

The Lord Chief Baron having rejected this evi-

(a) The writ having been against him and his son.

dence, the defendants had a verdict. The case now came before this court on a bill of exceptions, tendered on behalf of the plaintiff to, and sealed by the learned Lord Chief Baron on his rejecting the above evidence.

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The *Attorney General* (Sir John Campbell), for the plaintiff. First, the depositions which were rejected stated, that when the officer went to the plaintiff's cottage at *Maida Hill* to arrest him in *June* 1825, he was denied by his servant, but being found by the officer in a room in the house, was arrested by him at that time and place. That was an act of bankruptcy by keeping house; whereas the arrest of the plaintiff on 9 *November* in that year, at the house of his committee in *South Molton Street*, was not. It was, however, necessary for the defendants to prove that the act of bankruptcy relied on was committed after the 1 *September* 1825, when 6 *Geo.* 4. c. 16. came into operation, in order to support the commission which had been issued after that act, according to *Maggs v. Hunt* (a); and it was thereupon contended for the plaintiff, that the actual circumstances of his arrest in *June* at *Maida Hill* were sought to be transferred to his second arrest in *November*, which the evidence in question was offered to show had taken place in *South Molton Street*.

First, the depositions should have been admitted in evidence for the plaintiff, against the assignees acting under the commission issued against him. By 5 *Geo.* 2. c. 30. s. 41. the depositions taken on commissions of bankruptcy might be entered of record on petition, and in case of the death of the witnesses proving such bankruptcy, or in case of the loss of the originals, copies of such records might be given in evidence to prove such commissions, and the bankruptcy of the persons against whom they issued, "or other matters

(a) 4 Bing. 212: see *ante*, p. 126.

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or things," *e. g.* the precise time when the act of bankruptcy specified therein was committed; *Janson and Others v. Willson* (a). By the present bankrupt act, 6 Geo. 4. c. 16. s. 92. depositions taken before the commissioners of (inter alia) the act of bankruptcy, are made conclusive evidence of the matters therein respectively contained in certain actions by the assignees; but by sect. 96 they must first be entered of record, on application of a party interested therein. Office copies are made evidence by sect. 97. But the clause of 5 Geo. 2. c. 30. s. 41. making them evidence in case of the death of the witnesses proving the bankruptcy, not being re-enacted in 6 Geo. 4. c. 16. s. 92. (b), the proof of these depositions, when offered on behalf of the assignees in *Bernasconi and Others assignees, v. Farebrother*, was rejected by Lord Tenterden, and again by Alexander C. B., when tendered on behalf of the same sheriff, who was sued for a false return by *Wilton*. No enactment appears by which they are made evidence *against* the assignees, to disprove the validity of the commission, for, by the common rules of evidence, they must be so admissible; for they are examinations taken in the course of a judicial proceeding had by the petitioning creditor, who must be presumed to be in privity with the after-appointed assignees, in order to ascertain whether the plaintiff could be legally declared a bankrupt under the commission, and from witnesses adduced substantially for the other creditors, and in support of the commission. Positive enactment was therefore necessary to make them in any case evidence for the assignees, whose title-deeds they in fact are.

(a) Doug. 257.

(b) An omission now remedied by 2 and 3 Will. 4. c. 114. passed to amend 6 Geo. 4. c. 16. except in actions then, (*vis.* 15 August 1832,) pending, by which the validity of a commission was brought in question. See *post*, p. 542.

[*Taunton J.* Meetings to open commissions and declare a party bankrupt were strictly private, the only persons present before the commissioners being the solicitor to the commission and his witnesses, so that there would be no opportunity for cross-examination as to the act of bankruptcy; the witnesses were supposed to be produced by the petitioning creditor, who is however often in an interest different from that of the assignees afterwards appointed.] A fortiori, the depositions so taken would not, at common law, be evidence for the parties who produced the witnesses, though they might be evidence for strangers against them. In this case the two defendants, the assignees, by inrolling these depositions of record in hope to make them evidence in support of their then view of the case, have themselves authenticated them. That eminent writer on evidence, Mr. *Starkie*, says^(a), that depositions of witnesses, though made under the sanction of an oath, are not in general evidence as to the facts which they contain, unless the party to be affected by them has cross-examined the deponents, or has been legally called on, and had the opportunity to do so:" to which should be added, "or unless the party against whom the depositions are proposed to be used has adduced the witnesses who made them." In page 268, the same learned writer says, "Depositions in a former cause cannot in general be read against one who does not claim under the party (in the suit) with whom such depositions were taken, but at law they may be read where the defendant claims in privity with the defendant in the former suit." Then as the assignees claim under the commission, in privity with those who adduced witnesses in support of it, it is stronger to show that the depositions of those witnesses are evidence against them, than if a mere op-

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portunity for cross-examination had been given at the meeting to a party in an adverse interest. At least they were evidence for the jury till contradicted.

Secondly, after the death of the arresting officer, the written certificate made by him at the time, and sent in the course of office to the under-sheriff, who produced it, was admissible in evidence, to show as well the place where the arrest took place as the fact of such arrest; for it is a written declaration of a fact made at a time when it was not in dispute, by a person peculiarly cognizant of it, having no motive to misrepresent it, against his interest and in the discharge of his duty, according to the course of office, and is therefore unlike a case of verbal hearsay. And first, it was evidence of the fact of arrest, it being against the interest of the officer to charge himself with the receipt of the body of the plaintiff. If the acknowledgment of the receipt of money or goods, for which a party is accountable, be evidence against him, because against his interest, this document is admissible for a similar reason; for the sheriff is precluded by it from afterwards returning non est inventus, and it would have fixed his liability for an escape. But if the officer was not interested either way, his memorandum of a fact within his knowledge, in the execution of his duty, and according to the course of office, is receivable in evidence after his death. In *Doe d. Patteshall v. Turford*(a), the question at the trial was, whether a notice to quit had been served? For the lessor of the plaintiff it was proved to be the invariable course of his attorney's office, for the clerks who served the notices to quit, to indorse on a duplicate of such notice a memorandum of the fact and time of service. On this particular occasion the attorney (who had died before the trial,) himself prepared a notice to quit, to serve on the defendant, took


(a) 3 B. & Adol. 890.

it out with him with two others, prepared at the same time, and returned to the office in the evening, having indorsed on the duplicate of each notice a memorandum of its delivery to the tenant. Two of the notices having been proved to have been served by him on that day, it was held that the indorsement so made by him on the other, was admissible evidence to prove the service of the third notice. [*Tindal C. J.* That entry was corroborated by other circumstances rendering it probable that the fact of service occurred as stated. A clerk may have a present interest in deceiving his employer, for by entering a service as made, though he has neglected to do so, he avoids inquiry at the time, and he may hope it will never be in question; while if he lives, it could not be offered in evidence.]

Next, the certificate was admissible to show the place where the arrest was made. An entry made by a party deceased, which may be read in evidence, is proof of all the collateral circumstances within his knowledge which are mentioned in it, and naturally connected with the subject-matter, if the maker be without interest on the subject, or if his entry is contrary to his interest. Thus books in which stewards charge themselves with receipt of rents from tenants, are seldom produced to prove the receipt of the money only, but to show from whom and when it was received, or the tenure of the land by the party paying. [*Taunton J. Doe d. Powell v. Hill*, tried at *Monmouth* assizes before *C. B. Richards*, corroborates that observation.—The books of a steward were produced to show rents received by him from tenants within a certain ambit. I contended that they could only be received to prove the fact of payment and receipt of rent; the chief baron held, that he could not divide the evidence, or cut the entry into two, for if it was evidence for one purpose it was also for the other.] In *Higham v. Ridg-*

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way (a) the time of a birth was the material question, and the entry of a man-midwife marked *paid* against the interest of the party at the time, was admitted not merely to prove the facts of payment or attendance on the mother, but also to show the precise day of the party's birth. Why, by parity of reasoning, would it not have been evidence of the place of birth, had that been mentioned or material? as, *e. g.*, for eligibility to a fellowship, freedom of a corporation, &c. [Lord *Denman* C. J. It would not for the purposes of gaining a settlement, *Rex v. Erith* (b).] These entries are generally adduced in order to prove other circumstances naturally connected with the entry. Here part of the duty imposed on the bailiff being to make a certificate of the place where an arrest takes place, he does so in obedience to his superior, either against his own interest, or without interest on the subject. *Doe v. Robson* (c) supports the position that this document would be evidence of the time of the arrest, and it is difficult to say why it should not equally be so as to the place. In *Price v. Lord Torrington* (d), an entry signed by a deceased drayman according to the course of business at the brewhouse, stating that he had delivered so much beer that day, was held evidence in an action by his master the plaintiff, for beer sold and delivered to the defendant, though that entry was rather in discharge of the drayman, who was entrusted to deliver the beer. In *Pitman v. Maddox* (e), in an action for a tailor's bill, his shop-book was allowed in evidence by Lord *Holt*, it being proved that the servant who writ the book was dead, that the handwriting was his, and that he was accustomed to make the en-

(a) 10 East, 109.

(b) 8 East, 539.

(c) 15 East, 32.

(d) 1 Salk. 285. See *Calvert v. Archbishop of Canterbury*, 2 Esp. C. N. P. 646.

(e) 2 Salk. 690.

tries. Those cases go beyond the object here contended for. In *Hagedorn v. Reid* (a) the custom of a merchant's counting-house being shown to be for the clerk who copied a licence, to send the original off by the post, and make a memorandum on the copy of having done so, a copy of a licence in the merchant's letter-book, with a memorandum that the original had been sent to the correspondent abroad, was admitted in evidence after the death of the clerk. In *Champneys v. Peck* (b) a bill thus indorsed, "March 4, 1815, delivered a copy to C. D.", in the writing of a deceased clerk of the plaintiff, whose duty it was to deliver a copy of the bill, was held evidence to prove the delivery of the bill, the indorsement being shown to have existed at the time of the date. In *Pritt v. Fairclough* (c) an entry by a deceased clerk of the plaintiff in a letter book, professing to be a copy of a letter of the same date from the plaintiff to the defendants, was held good secondary evidence of the contents of the letter, on proof that according to the plaintiff's course of business the letters which he wrote were copied by this clerk, and then sent off by post; and that, in other instances, the copies so made by this clerk had been compared with the originals, and always found correct. Nor is *Calvert v. Archbishop of Canterbury* (d) contrary, for the entry there rejected did not appear to be contemporaneous, or to be made in discharge of the writer's duty. In *Cooper v. Marsden* (e) the entry was not shown to be contemporaneous, nor was the clerk dead. In *Warren d. Webb v. Grenville* (f) entries of the charges made in an attorney's book were admitted to show the surrender of a life estate, in order to support a subsequent reco-

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(a) 3 Camp. 379. See 4 id. 193.

(b) 1 Stark. N. P. C. 404.

(c) 3 Camp. 305.

(d) 2 Esp. C. N. P. 645.

(e) 1 Esp. C. N. P. 1.

(f) Stra. 1129.

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very. *Doe v. Robson* (a) is strongly in favour of the plaintiff. The question was, when a particular lease, purporting on the face of it to take effect in reversion, viz. from a future day, was actually granted? as the power under which the lessor assumed to demise, was to grant a lease to take effect in possession only; and entries of charges in an attorney's book, which were shown to have been paid, were admitted to show that it was not really executed till after its date, and after the day named in the lease from which it was to take effect. Lord *Ellenborough* rests his judgment on the total absence of interest in the parties making the entries to pervert the fact, and at the same time a competency in them to know it. Mr. *Starkie*, in his excellent work already quoted, says (volume i. 298.) "It may, however, be observed, that the consideration that the entry was made in the course of discharging a professional or official duty, or even in the ordinary course of business in which the party was engaged, seems, both in reason and upon the authorities, to afford a much safer warrant for giving credit to such evidence, than is supplied by the consideration that the entry or declaration might possibly have been used to the prejudice of the party, and in many instances the doctrine of admissibility on that ground has been pushed to an extraordinary, if not untenable extent." The oral declaration of the father as to the *place* of the child's birth was rejected in *Rex v. Erith*, because that not being matter of pedigree, his hearsay evidence was not admissible, as it would have been as to the *time* of the birth, *Goodright v. Moss* (b).

Sir *James Scarlett* contra. It was at first said that depositions taken before the commissioners would be

(a) 15 East, 32.

(b) Cowp. 591.

evidence against the assignees, because it was a judicial proceeding which afforded an opportunity to cross-examine the witnesses there; but after Mr. Justice *Taunton* had shown that a party was declared bankrupt at a private meeting, the argument for their admissibility was mainly rested on the supposed privity between them and the petitioning creditors, who having issued the commission had subsequently produced the witnesses who made the depositions before the commissioners; but how can such privity be taken to exist? A commission having been issued, and the plaintiff declared a bankrupt by the commissioners at their private meeting, the plaintiff acted under it, and put forth a list of proposed assignees. In the event, other persons being proposed for that trust by adverse creditors were elected assignees, after which he disputed the commission. These assignees cannot be presumed to be in privity with the petitioning creditor and the witnesses adduced by him before the commissioners. No estate or interest is here claimed under any assignment founded on the particular act of bankruptcy. Had the defendants' title to sue as assignees rested on the depositions only, they must have produced them; but if they were able to support the commission by other means, then if they were produced by the other side to impugn the commission which they were taken to support, the assignees might repudiate all privity with them. Still less can the depositions be evidence against the assignees by the bankrupt act, 6 *Geo.* 4. c. 16., for where in an action against them notice is given by the bankrupt himself of disputing his commission and act of bankruptcy, as was here done, (see s. 90,) the depositions, if evidence at all under the statute, must be conclusive. By s. 92. they are made conclusive evidence in actions by assignees for any debt or demand for which the bankrupt might have sued, unless such notice to dispute

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is given. [*Patteson* J. Sect. 96., which enacts, inter alia, that no adjudication in bankruptcy by the commissioners shall be evidence until entered of record, and that every such instrument shall be so entered of record on application of any party interested, and that the Lord Chancellor may on petition direct the inrolment of any depositions or other matter relating to commissions of bankrupt, does not make that inrolment imperative, though necessary to their being produced in evidence under the other provisions of that section.] The fact that these assignees inrolled the depositions in question, does not of itself make them evidence against them, that being done in pursuance of the act, in order to have that evidence ready for themselves to support the commission, if it should be afterwards desirable to produce it. This cause was pending before the passing 2 and 3 Will. 4. c. 114. s. 7., by which, in event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, assignees or persons claiming through or under them, or acting by their authority, in such cases only where they claim, maintain, or defend some right, title, interest, claim or demand, which the bankrupt might have claimed, maintained, or defended, in case no commission or fiat had issued, may give in evidence, in support of a commission or fiat, any deposition of such deceased witness relative to such act of bankruptcy &c., which has been duly inrolled, and is therefore excluded from its operation. The enactment of 5 Geo. 2. c. 30. s. 41., omitted in 6 Geo. 4. c. 16. s. 92., was then replaced, but even that section excludes the depositions on both sides in actions not within its purview.

On the second point, to admit the argument for the plaintiff, that the certificate of a public functionary written by him in the course of office, on a subject within his knowledge, and, as far as can be

afterwards ascertained, without any interest on the subject, may be given in evidence after his decease, would be to dispense with the primary rule that rights can only be bound by evidence given under the obligation of an oath. The contents of every counting-house would be evidence after the decease of clerks sent to witness mercantile transactions. Again, letters and statements collected by an historian in the course of his employment to write a history of the times, would be evidence of the facts there detailed. But every exception to the rule hitherto introduced has turned on the question, whether the necessities of mankind have justified a departure from it in this particular case only. Thus in *Mr. Tyrwhitt's* report of the present case (a), Lord *Lyndhurst* says, "Suppose non est inventus had been returned by the sheriff, this memorandum would not have been evidence in an action against the sheriff. Many entries are inadmissible in evidence though against the interest of the maker. Thus, on a question whether a man had been tried or convicted or not, a letter in which he confessed it could not be admitted" (b). *Bayley B.* added, "The excepted case is where a subscribing witness to a deed admits on his death-bed that it was forged." And he afterwards appears to doubt whether such a certificate would even prove the fact of arrest. If the certificate be evidence of the time and place of arrest, all other circumstances attending it would be evidence, if placed in the certificate by the officer without apparent interest, *e. g.* an acknowledgment of debt, retainer, &c. made to him by the defendant. But the principle of the decided cases is contrary. For, where a deceased steward charges himself in a rental with a receipt of rent, the evidence is not confined to the fact of payment of rent, but embraces the whole entry. Thus, if it

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(a) *Ante*, Vol. I. 341.

(b) *Res v. Castell Carrinion*, 8 East, 77, and 11 East, 309.

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state a receipt of rent from *A.* "tenant of a certain manor," it is evidence as the *res gesta* itself that *A.* paid it on that account, but nothing added by the steward as to the occasion of the payment would be admissible. *Higham v. Ridgway*(a) goes to the extreme point, as appeared to be Lord *Eldon's* opinion in *Barker v. Ray*(b). *Warren v. Grenville* is explained by Lord *Mansfield* in *Goodtitle v. Duke of Chandos*(c) thus: "A receipt had been given on the bill which contained the articles for drawing and ingrossing the surrender, so that there was positive proof of an actual surrender. In *Doe v. Robson*, and *Warren v. Grenville*, items of charges in attornies bills for business done which had been paid for, were admitted in evidence after their deaths, to prove when the work was done, the desired inference being that it must have been done before it was so paid for. *Higham v. Ridgway*, the case of a man-midwife's entry, is a similar case, resting on like grounds. *Hagedorn v. Reid*(d) is a doubtful decision, which might however stand on other grounds, so that it was never necessary to review it in banc. In *Champneys v. Peck*(e), an undefended cause, it does not appear what further evidence was adduced. If the plaintiff proved an admission by the defendant that he had received the bill without saying when, and the defendant did not prove the receipt of the bill at any other time, the indorsement by the deceased clerk on the duplicate bill might be *prima facie* evidence of its due delivery. The judgment of Lord *Tenterden* in *Doe v. Twyford*, must be taken with reference to all the circumstances, and *Taunton J.* expressly rests his opinion on the facts corroborating the memorandum. The entry of a de-

(a) 10 East, 109.

(b) 2 Russ. R. 53; see 1 Stark on Ev. 317.

(c) 2 Burr. 1072.

(d) 3 Camp. 337; 1 M. & S. 567, S. C.

(e) 1 Stark, C. N. P. 404.

ceased clerk may be an important link in a chain of other circumstances admitted to be true. In *Salle v. Thomas* (a), prison books were admitted to prove the time at which an imprisonment begun, but not the cause of it. If this is evidence at all to prove the time of arrest, it is not admissible to prove the place at which it happened.

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The *Attorney-General* in reply. Assignees who accept that appointment without being bound to do so become privy to the adjudication and to the previous depositions on which it proceeded. Here, they have also authenticated them by solemn inrolment. On the second point, the entries in *Warren v. Grenville* and *Doe v. Robson* being made without interest, did not require or receive authenticity from the subsequent acknowledgments of payment, but were admitted on the general principle stated by Lord *Ellenborough* in *Doe v. Robson*; nor does the argument that the work must be taken to have been done before the bill was paid, affect those cases. In *Higham v. Ridgway* no date is affixed to the entry of "paid," nor did the date of the payment in *Warren v. Grenville* appear. In *Doe v. Robson* payment seems to have been proved de hors the entry admitted in evidence. Lord *Eldon*, in *Barker v. Ray*, speaks of parol declarations as in *Davies v. Pierce* (b), *Uncle v. Watson* (c); not of contemporaneous written entries coming from a proper custody, which are of a very different nature and preclude perjury. [Lord *Denman* C. J. No extrinsic evidence was given in *Higham v. Ridgway* that the entry in the book was contemporaneous with the event.]

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court. This action was brought by a person who

(a) 3 B. & P. 168.

(b) 2 T. R. 53.

(c) 4 Taunt. 16, &c.

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had been declared a bankrupt, against his assignees, in order to dispute the validity of his commission. On the trial it became necessary to inquire whether the plaintiff had been arrested in a particular place (*South Molton Street*), on the 9th of November 1825, by one *Wright* a sheriff's officer, who died before the trial, accompanied by a person named *Brett*. To prove that the plaintiff had been so arrested, he tendered evidence of two descriptions, both of which the chief baron refused to receive. A bill of exceptions was thereupon tendered, and the question was argued on the 9th of May before this court of error. The first head of the evidence rejected consisted of depositions made by the two deceased persons on opening the commission against the plaintiff, which had been inrolled of record in the court of Chancery by the defendants as assignees.

It was contended that they were admissible against the defendants: first, by reason of some supposed privity between them as assignees, and the petitioning creditor who must have brought forward the depositions, and to whom the defendants were said to have attorned by acting under the commission: and, secondly, because the assignees had substantially affirmed the truth of the depositions by causing them to be inrolled, and so making them evidence. But no decision or dictum was cited in favour of this attempt; no instance was ever cited of such evidence being tendered, often as it must have been desirable: and we think the admission of it could not be justified by any principle of law.

To prove the same fact the plaintiff tendered a certificate written and signed by *Wright*, the deceased sheriff's officer before mentioned, stating in terms that he arrested the plaintiff on the day in question in *South Molton Street*, at the suit of one *Brereton*. The tender of this certificate was preceded by proof that it

was part of the course of the office of the sheriff of *Middlesex* to require a return in writing of the arrest, and of the place where it is made, under the hand of the officer making it, that the certificate tendered was annexed to the writ issued against the plaintiff on the 8th of *November* 1825, at the suit of *Brereton*, of which writ *Wright* had the execution. The under-sheriff also proved that he could not return a defendant not arrested when he had got a similar certificate of arrest. The writ and the certificate were produced by the under-sheriff. Whether this certificate is evidence of the arrest having been made at the place named in it, is the question which we are now to decide.

The ground on which the attorney-general first rested his argument for the plaintiff in error was not much relied on by him, viz. that the certificate was an admission against the interest of the party making it, because it renders him liable for the body arrested. He had recourse to a much broader principle, and laid it down as a rule, that an entry written by a person deceased in the course of his duty, where he had no interest in stating an untruth, is to be received as proof of the fact stated in the entry, and of every circumstance therein described, which would naturally accompany the fact itself.

The discussion of this point involved the general principles of evidence, and a long list of cases determined by judges of the highest authority, from that of *Price v. Lord Torrington*, before *Holt C. J.*, to *Doe d. Patteshall v. Turford*, recently decided by Lord *Tenterden* (a) in the court of King's Bench. After carefully considering, however, all that was urged, we do not find it necessary, and therefore think it would not be proper to enter upon that extensive argument; for as all the terms of the legal proposition above laid down are manifestly essential to render the

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(a) 3 B. & Adol. 864.

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certificate admissible, if any one of them fails, the plaintiff in error cannot succeed; and we are all of opinion, that whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting then, for the sake of argument, that the entry tendered was evidence of the fact and even of the day when the arrest was made (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done.

Judgment for the defendants.

IN THE EXCHEQUER OF PLEAS.

HOWELL and Another, Assignees of JOHN WATERS and DAVID JONES, Bankrupts, surviving Partners of ROBERT WATERS, deceased, *against* WILLIAM JONES.

The following guarantie was given by the defendant in Jan. 1825 to

ASSUMPSIT. The first count of the declaration stated, that whereas heretofore, in the lifetime of the said *Robert*, and before the bankruptcy of the said certain bankers:—"Please to open an account with, and honour the cheques of *H. B.* on *Mill* account, for whom I will be responsible." The account having been opened, the bankers made advances to *H. B.* from time to time till *Feb.* 1827, when they ceased. A large balance was then due to them from *H. B.*, who in *October* of that year paid a sum into the bank on account of it. In *Feb.* 1828 the bankers took an acceptance from *H. B.* at three months for the balances of his account with interest, without the defendant's knowledge. In several previous instances the bankers had taken similar acceptances from customers who had overdrawn their accounts; but though the defendant had been consulted by them as their attorney on the dishonour of several of them, it was not shown that he was aware of the practice of the bank in that particular:—Held, that the taking the acceptance from the principal debtor by the parties guaranteed, without the knowledge or assent of the surety, was a giving time to the principal, which altered the situation of the surety, and therefore discharged him from liability on the guarantie.

John and David, to wit, on 4 January 1825, and from thence until and at the time of the death of the said *Robert*, they the said *Robert, John, and David*, were carrying on the business of bankers in co-partnership, to wit, in the county of *Carmarthen*, and afterwards, and in the lifetime of the said *Robert*, and before the bankruptcy of the said *John and David*, to wit, on &c. in &c., in consideration that they the said *Robert, John, and David*, at the special instance and request of the said defendant, would open an account with and honour the cheques of one *H. Bowers*, on a certain account, to wit, an account, to be called the *Mill* account, he the said defendant undertook, and then and there faithfully promised the said *Robert, John, and David*, to be responsible to them for him the said *H. Bowers*. Averment, that the plaintiffs, confiding &c., did then and there, in the lifetime of the said *Robert*, and before the bankruptcy of the said *John and David*, open an account accordingly with the said *H. Bowers* upon the said *Mill* account, and did afterwards, to wit, on the day and year aforesaid, and on divers other days in the lifetime of the said *Robert*, and before the bankruptcy of the said *John and David*, to wit, on &c. honour divers cheques of the said *H. Bowers*, on the said *Mill* account, and did, at those respective times, pay and advance to and on account of the said *H. Bowers*, in respect of the said cheques, and otherwise on the said account, divers sums amounting to 2000*l.*, and exceeding by 1000*l.* all the monies paid to, and had and received by the said *Robert, John, and David*, by and from and on account of the said *H. Bowers*, to wit, on &c. Averment, that the said *H. Bowers*, although often requested so to do, has not paid the said last-mentioned sum of money, or any part thereof, to the said *Robert, John, and David*, or any or either of them, in the lifetime of the said *Robert*, and before the bankruptcy of the said *John and David*, or to the said

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John and David, or either of them, after the death of the said *Robert*, and before their bankruptcy: By reason of all which said several premises, the said *Henry* was indebted to the said *John and David*, after the death of the said *Robert*, and at the time of their bankruptcy, to wit, on 31 *December* 1831, in the sum of 1500*l.*, in respect of the said account so opened, and of the said several cheques so honoured as aforesaid. Averment, that he the said *Henry* has not at any time since the bankruptcy of the said *John and David*, paid the said last-mentioned sum of money, or any part thereof, to them the said plaintiffs, as such assignees as aforesaid, or to either of them, although often requested so to do; of all which premises the said defendant afterwards, to wit, on 1 *September* 1833, had notice, and was then and there requested by the said plaintiffs to be responsible to and indemnify them the said plaintiffs as such assignees as aforesaid, for and in respect of the said sum of money last mentioned, according to the said promise and undertaking by him in that behalf, in manner aforesaid: Yet the said defendant, not regarding &c., has not as yet been responsible to or indemnified the said plaintiffs' assignees as aforesaid, for or in respect of the said sum of money last mentioned, or any part thereof, although often requested so to do, but has wholly refused, and still does refuse so to do, and the said last-mentioned sum of money still remains wholly due and unpaid to the said plaintiffs' assignees as aforesaid, Counts for money paid, on a promise to *John and David* as surviving partners, and on an account stated with the assignees. Pleas: general issue, and *actio non accrevit infra sex annos*.

The plaintiffs' particulars of demand stated the action to be for 1083*l.* 18*s.* 11*d.*, with interest from 31 *December* 1832 to the time of payment.

At the trial at the last *Carmarthenshire* assizes, before *Gurney B.*, the following facts appeared:—*Waters* and Co. had carried on business as bankers at *Carmarthen* for many years. Before *January* 1825 their firm consisted of *Robert* and *John Waters* and *David Jones*, of whom *Robert Waters* died in 1828. The surviving partners then took *Mr. A. Jones* into the firm, and carried on business to *January* 1832, when they stopped payment, and a fiat issued against them in *July*, under which the plaintiffs were appointed assignees.

In 1825 *Waters* and Co. permitted one *H. Bowers*, a miller, to open an account with them, on his procuring them the following guarantie from the defendant, *William Jones*, who was an attorney, carrying on business at *Carmarthen*, the legal adviser of *Waters* and Co., and having large deposits in their hands.

Henry Bowers, Mill account.

Messrs. *Robert Waters* and Co.

Please to open an account with, and honour the cheques of *Mr. Henry Bowers*, on *Mill* account, for whom I will be responsible.


W. Jones.

Carmarthen, 4 January 1825.

This guarantie was given by the defendant, who attended at the bank with *Bowers*, and in consequence *Waters* and *Jones* received deposits as bankers, on account of *Bowers*, and made him sundry advances in cash, and by honouring his cheques till 8 *February* 1827 inclusive. From that day to 31 *December* 1832, no other advances were made by them to him, but on 30 *October* 14*l.* 10*s.* 9*d.* was paid to them on the credit of the balance then standing against him; 846*l.* 14*s.* 7*d.* still remained due. On 31 *December* 1826 it was 1037*l.* 16*s.* 4*d.* against him. On 30 *October* 1827

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he paid 141*l.* 10*s.* 9*d.* on account of the balance then due. On 31 *December* 1827 it was 846*l.* 14*s.* 7*d.* against him. On 30 *June* 1828, it was, with interest, 870*l.* 0*s.* 9*d.* Interest was afterwards regularly charged accordingly. On 31 *October* 1828, the balance was 891*l.* 16*s.* 11*d.*

When accounts were much overdrawn it had been in several cases the practice of *Waters* and Co. (as well as of a neighbouring bank) to require acceptances from their customers for the balances appearing due on the accounts; thus forming what were called "covers" for them. This was done in order to remit them to the *London* bankers, to prove the amount due, without its being intended that the drafts should at maturity be paid. The defendant being confidential legal adviser to the bankers, had been consulted by them upon cases of similar acceptances, when dishonoured, which they said were taken by them for cash balances, but whether before or after the guarantie in question did not appear. Nor was he shown to have been personally acquainted with their practice in that respect, or that the dishonoured bills had been taken in pursuance of it. On *February* 26, 1828, *Waters* and Co. having called on *Bowers* for such a "cover," he gave them the following acceptance, without the knowledge of the defendant.

£846: 14*s.* 7*d.*

Carmarthen, February 26, 1828.

Three months after date pay to our order, in *London*, 846*l.* 14*s.* 7*d.* value received.

To Mr. *Henry Bowers*.

R. Waters & Co.

Accepted, at Messrs. *Barclay*
and Co. bankers, *London*.

Henry Bowers.

Bowers's account was credited with this bill; it was

returned dishonoured. The writ in this action was issued upon it 25 *October* 1833. The plaintiffs had a verdict for 1027*l.* 6*s.* 1*d.* for principal and interest due, subject to a motion for a nonsuit, on two points taken at the trial. First, that the defendant being a mere surety was discharged by the bankrupt's having taken the acceptance in question, by which extension of credit time was given to the principal. Secondly, that the plaintiff's action on the note was barred by the statute of limitations(a).

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Evans having obtained a rule in *Easter* term, calling on the plaintiff to show cause why the verdict should not be set aside, and a nonsuit entered,

Whitcombe, Follett and Powell showed cause. The first point, *viz.* that the surety was here discharged by giving time to the principal, is of general importance. This is not the case of an ordinary guarantie for securing a specific debt, but it is a continuing guarantie for advances to be made to a person with whom bankers are on its security to open and keep an account. The usual manner of carrying on that account by those bankers with their customers must have been then contemplated by the parties. There is evidence that the defendant knew that it was a usual habit, if not a general practice, of their bankers to take acceptances from their customers, as collateral securities or covers for the balance of overdrawn accounts. [*Alderson* B. All you can assume is, that the defendant knew that in some instances they did.] Taking it that he did not know it as a general usage, it must be taken that the surety informed himself, at the time he gave the guarantie, of the usual mode of

(a) Another point taken at the trial was not further insisted on.

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dealing with customers then adopted by the bankers who were to be secured. That may be gathered from *Combe v. Woolf*(a). He in fact undertook to guarantee advances made under the usual terms as to credit, no conditions to the contrary having been imposed at the time of giving the guarantee. He might have insisted that he was discharged, by any abridgment in the case of his principal, of the credit usually allowed to similar customers. Then how can he now complain that the bankers have dealt with his principal in the manner they did with their other customers? [*Alderson B.* The test of the case is, whether the taking this acceptance by the bankers placed the defendant in a different situation. Now, had he come to them afterwards, stating the doubtful solvency of his principal, and pressing them to get the debt from him as soon as possible, their answer must have been, that they had precluded themselves from suing him for three months, by taking his acceptance, while they might otherwise have sued immediately.]

These bankers, by taking this acceptance after the security given, did not alter the situation in which the surety had a right to expect himself to be placed when he gave this guarantee. In *Combe v. Woolf* the guarantee contained no stipulation as to the credit to be given, nor does it appear that the plaintiffs might not have sued for the price of the porter sold before it reached its destination. That surety's judgment of his situation, at the time of giving the guarantee, could only have turned on his actual knowledge that eight months credit was usual. The court assume he had that knowledge, by having informed himself of the course of dealing. [*Alderson B.* That case did not decide that the surety would be discharged if he knew of the credit usually given, but that where more credit

(a) 8 Bing. 156.

than usual was given, the surety was discharged, because his situation was altered. It was not necessary that the court should assume that he had actual knowledge of the credit, for it was extended beyond the usual period, and was therefore immaterial in the suit. But whether the court assumed it because it was the practice of the house, or because the surety knew it or was admitted to know it, is immaterial to the judgment of the chief justice.] In all the cases in equity in which a surety has been discharged on account of time given to the principal, the time was given after the guarantie had been entered into, and in a manner not contemplated at the time of giving it. That was an act without the surety's consent. In *Lewis v. Jones* (a), *Holroyd J.* says, "The extinguishment of the debt puts an end to the agreement of the principal and surety." Now this guarantie being open and general without limit, the defendant was liable for all advances made to *Bowers* till he gave notice to the contrary. The taking *Bowers's* acceptance neither extinguished the debt or added to its existence beyond the period intended by the guarantie, for the bill was not intended to be sued on at maturity, but to lie at the *London* bankers till that time. *Goring v. Edwards* (b) shows, that want of notice to or knowledge by a surety of vain applications for payment made to the principal after the guarantie given, affords no answer to an action; and *Gaselee J.* adds, that it is the duty of a surety to go and inquire into the state of the transactions between his principal and the parties guarantied.

On the second point, whether the plaintiffs are barred by the statute of limitations, the responsibility of customer and surety are co-extensive. Now as the bankers had a clear remedy against the principal on the 26 February 1828, when the bill was taken for the ba-

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(a) 4 B. & Cr. 506.

(b) 6 Bing. 94.

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lance of the account, the statute has not operated, and their remedy against the surety remains.

John Evans and *E. V. Williams* contra. This transaction shows, that the business of these bankers was irregularly conducted, without disclosing any thing amounting to a custom of trade or course of dealing. The account was opened early in 1825, but though balances were taken on 31 *December* in that and the two next years, and were on each occasion against the customer, no bill was required from him to cover the account till *February* 1828. The whole evidence on the subject amounted to this, that the bankers sometimes took a customer's acceptance for the balance of an overdrawn account, if, being satisfied of his solvency, they could deposit it as a security with the *London* bankers. But if they might postpone taking a bill till the fourth year of the account, they might renew it for an indefinite period, or might suffer the account to stand over, and by taking a bill after twenty years had elapsed oust the surety of the benefit of the statutes of limitation.

It has been argued that nothing has here occurred amounting to a giving of time. Now in *Samuel v. Howarth*(a), Lord *Eldon* thus lays down the rule between principal and surety, after premising that the same principles which have been held to discharge the surety in equity, will operate to discharge him also at law:—"The rule is this, that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and the principal, not where the creditor is merely inactive; and in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power


(a) 3 *Merivale*, 278.

of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract." Now if a surety is for a moment deprived of his remedy against his principal, by the act of the party guarantied, in giving him time for payment, he is discharged. Then, had this defendant the same remedy against *Bowers* after his acceptance was taken by the bankers as he had before? That acceptance extended the time to which the guarantie applied, without leaving it in the surety's power to put an end to it; for he might previously have called on the bankers to procure immediate payment of the balance due, or, having paid it to them, might have instantly sued the principal; but, whereas, after this acceptance taken, the bankers could not sue the customer for three months, and the defendant's situation was altered. [*Alderson* B. Beyond what period was credit here given? No period of credit is given, then what is a "giving time?" If there was originally an express contract between *Bowers* and the bankers that this bill should be given at three months by way of cover, it is hard to say that time was given.] There is no evidence that the bankers were obliged to give three months credit whenever a balance was due from their customers. Here it was not given on the stating the last balance on 31 *December* 1827, or till *February* 1828.

On the second point, the statute began to run from *February* 1827, when the bankers refused to make any further advances to *Bowers*; for the "mill account" to which alone the guarantie applies, was then closed, and the subsequent liability of *Bowers*, on his acceptance given 26 *February* 1828, had no reference to the guarantie. Again, the payment by *Bowers* in *October* 1828, in part of the bankers' demand, will

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not take the case out of the statute as against the surety, for it was made by him as the principal debtor, and not as a joint contractor with this defendant, so that *Whitcomb v. Whiting*(a) and *Burleigh v. Scott*(b) do not apply.

Cur. adv. vult.

The judgment of the court was afterwards delivered by

BOLLAND B.—This was an action brought against the defendant to recover the balance of an account due from one *Bowers* to the plaintiffs, and for which the defendant had given a guarantie in writing. The guarantie was dated 4 *January* 1825, was signed by the defendant, and was as follows:—

“ Messrs. *Robert Waters* and Co.

Please to open an account with and honour the cheques of Mr. *Henry Bowers*, on *Mill* account, for whom I will be responsible.

W. Jones.”

Under this guarantie the plaintiffs proceeded to make advances as bankers to *Bowers*, and at the close of 1825 the balance due from *Bowers* to them amounted to 754*l.*; at the close of 1826, to 1037*l.*; at the close of 1827, to 846*l.* Subsequently to *February* 1827, no fresh advances were made by the plaintiffs to *Bowers*; but on 30 *October* 1827, a payment of 141*l.* was made by him to the plaintiffs. For the balance thus remaining due to the bankers at the close of 1827, they in *February* 1828, without the knowledge or assent of the defendants, took an acceptance of *Bowers*, payable three months after the date thereof.

The question now for the consideration of the court is, whether by so doing they have discharged the present defendant from his liability as guarantie for the

(a) Dougl. 652.

(b) 2 B. & Cr. 29.

debt of *Bowers*? The case of *Combe v. Woolf* (a) establishes that a plaintiff who, without the knowledge or assent of the surety, "gives time" to the principal debtor by a contract made for that purpose between them, thereby exonerates altogether the surety from his liability. But the real question is, what is meant by "giving time." We think it means extending the period at which, by the contract between them, the principal debtor was originally liable to pay the creditor, and extending it by a new and valid contract between the creditor and the principal debtor, to which the surety does not assent. In the case above cited, the surety undertook to guarantee a contract in which the debtor was to have eight months credit; and was exonerated by the fact, that the creditor had bound himself, by taking a bill, to give eleven months credit for the balance due. In *Orme v. Young* (b), Lord C. J. Gibbs puts it thus: "What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively refraining—not exacting the money at the time," (by which of course he means at the time when due by the contract between the principal and the creditor,) "but it is the act of the creditor depriving himself of the power of suing by something obligatory, which prevents the surety from coming into a court of equity for relief, because the principal having tied his own hands the surety cannot release them." If, however, the creditor continues to deal with the principal debtor on the original terms of the contract between them, he cannot, we think, by any length of credit which he so gives, be properly said to "give time" to the debtor. The time must be given as an extension of the original credit. If, therefore, it could be shown in fact that the taking the three months' bill in this case, in *February* 1828, from the principal debtor, was part of the original contract be-

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(a) 8 Bing. 156.

(b) Holt N. P. C. 84.

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tween the plaintiffs and *Bowers*, for which the defendant became the guarantee, there would be much force in the arguments addressed to the court on the part of the plaintiffs, that the defendant was bound to know the nature of the contract which he guaranteed, and that the course of dealing between plaintiffs and *Bowers* might be properly referred to for that purpose. But, giving them the full benefit of that argument, it is disposed of by the facts of the case. Here a balance is struck in 1825, and no bill taken; the same takes place in 1826 and in 1827, at which period all advances ceased on the part of the plaintiffs. It cannot be for a moment doubted, upon the facts appearing on the learned judge's report, that in *February* 1827 an action could have been maintained against *Bowers* for the balance then due. So again, in *October* 1827, after the payment of 141*l.* by *Bowers*, no one can doubt that the bankers could have maintained an action immediately for the then balance, either against *Bowers* or in failure of payment by him against the defendant. Then after this, by an agreement to which defendant is not privy or an assenting party, the plaintiffs bind themselves not to sue *Bowers* for that balance during the period between *February* 1828 and *May* 1828. We think this was clearly such a giving time to the principal debtor, as completely to exonerate the surety from all subsequent liability. This renders it unnecessary to discuss the second objection.

The rule therefore for entering a nonsuit must be made

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THE plaintiff obtained a verdict in this case at the last summer assizes for *Somersetshire*, before *Patteson J.*, with leave to the defendant to move to enter a nonsuit. A rule having been obtained accordingly,

Erle, for the plaintiff, showed cause in last term, and

Barstow supported the rule for the defendants.

The court took time to consider. The pleadings and facts are so fully detailed in the judgment that their insertion appears unnecessary.

PARKE B. now delivered the judgment of the court.—This case was argued before myself and my brothers *Bolland*, *Alderson*, and *Gurney*, during the last term, when cause was shown against a rule to enter a nonsuit. The case was tried before my brother *Patteson* at the last summer assizes for *Somersetshire*, when a verdict was found for the plaintiff, with leave to move to enter a nonsuit.

The two first counts, which were upon a special promise to surrender a certain dwelling-house to the plaintiff; and a third count, which was for double rent claimed to be due from the defendants for holding over, were not proved. The question arose on the fourth count, which was for use and occupation, to which there was a plea of the general issue, and also a special plea that the defendants ought not to be charged otherwise than as executors of *W. H. Tozer*, the lessee for years, at the rent of 48*l.*, because the messuage was of much less annual value, and they had derived no rent or

An action was brought against two persons, being the executors of a deceased termor, for the use and occupation by them of the demised premises; an entry and occupation by one was proved. Held, that it did not enure as that of both, so as to make them jointly liable *de bonis propriis* in assumpsit for use and occupation.

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profit from the demised premises, and had fully administered his effects. To this special plea there was a replication that the defendants withheld possession, and did not offer to deliver up the demised premises at any time *before* the rent in question accrued due, or give notice that they were ready to do so, or that they had not any effects to be administered (a); and the rejoinder averred that they did give notice, and offered *before* the rent became due to give up the demised premises, and did not withhold possession.

Upon the trial it appeared that Mr. *W. H. Tozer* in his life-time was tenant to the plaintiff by a demise not under seal, dated 29th *January* 1830, for seven years; that both the defendants were his executors, and acted in that capacity, but the defendant *Underhay* alone entered and took possession, and no notice to quit or unconditional offer to give up the possession was proved until *after* the rent claimed became due; the issue therefore on the rejoinder to the special plea was properly found against the defendants, and the only question was, Whether both defendants were liable in their individual characters on the count for use and occupation.

The learned judge was of opinion, upon the trial, that the entry of one was the entry of both, so as to charge both in this form of action, but reserved the point for the decision of the court.

Upon consideration, we think that the entry of, and occupation by, one executor, is not sufficient to render the other liable, and that without an entry and occupation this form of action is not maintainable against the other executor.

There is no doubt but that several executors have a joint and entire interest in and authority over all the goods of the testator, including chattels real; *Comyns's*

(a) See *Reid v. Lord Tenterden*, *ante*, 111.

Digest, tit. *Administrator* (B. 11). In *Bacon's Abridgment*, tit. *Executors and Administrators* (D.), it is laid down, and rightly, that the acts done by any one of them which relate either to the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed the acts of all. The act of one, in disposing of the testator's effects, is the act of the other to give validity to the disposition and to preclude him from avoiding it; and the act of one in possessing himself of the effects is the act of the other, so as to entitle him to a joint interest in possession, and to a joint right of action if they are afterwards taken away. But the question is, whether the act of one, in taking possession of a chattel real or personal of the testator, can create a new liability and impose a charge on the other personally and in his own individual character, which without such act would never have existed? and we think it cannot.

In *Hargthorpe v. Milforth* (a) the court says, "the acts of one executor shall not hurt the other for his own goods." And again, "where they shall be charged with the goods of the testator, the nonsuit, release, or other act of one shall bind the other, but not if they shall be charged of their own goods; 11 H. 4, 69." "If one executor takes possession of and uses a personal chattel, the other is not liable to the creditors for such act of his co-executor."—So if one executor enter and enjoy the land demised, and take the profits beyond the rent, the other executor would not be chargeable with the amount as assets to the creditors; the one who actually received would alone be responsible.—In respect then to the creditors, the actual possession and use by one is not in law the possession and use by both, so as to attach a liability upon both; and it seems to us that if instead of disposing of the term,

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(a) Cro. Eliz. 318.

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one of the executors takes the actual possession of and enjoys the land demised, such enjoyment is not by law the possession and enjoyment of both, and it does not render both chargeable to the lessor to pay a compensation to him for it as joint occupiers in their own right.

But in order to support this action for use and occupation, it is necessary that the land should have been occupied by the defendant, his agents or under-tenants, during the time for which the compensation is claimed for use and occupation, though it need not have been beneficially or even *actually* so enjoyed, but the defendant must *have taken possession* and continue to have the right of actual occupation whenever he pleases to take it.

Thus, where an *interesse termini* never took effect as a lease, the lessee not having *entered*, the action was held not to be maintainable; *Edge v. Strafford* (a). So in *Naish v. Tatlock* (b), where there was an agreement to pay rent annually, and the tenant occupied for a part of the year till he became bankrupt, and his assignees for the remainder, till the rent became due, it was held, that though the latter might be liable to an action of debt for the whole rent which became due after the assignment, they were not liable in an action for use and occupation, except during the time that they occupied; and *Eyre C. J.* said, "that the remedy given by the statute 11 *Geo. 2. c. 19.* was in its own nature not co-extensive with a contract for rent, nor did it seem to have been within the scope and purview of the act to make it co-extensive with all the remedies for the recovery of rents claimed to be due by the mere force of the contract for rent, but that the statute meant to provide an easy remedy in the simple

(a) *Ante*, Vol. I. 293.

(b) 2 *Hen. Black.* 319.

case of actual occupation, leaving other more complicated cases to their ordinary remedy.

In the case of *Bull v. Sibbs* (a) there was an actual occupation by the under-tenant of the lessee. In *Baker v. Holzapffel* (b) there was an occupation by the lessee till the premises were burned down, and then as much occupation as the lessee chose to make use of. So in the cases put by C. J. Gibbs, 5 Taunton, 519; and by Lord C. J. Abbott, in 2 Starkie's Nisi Prius Cases, 527; where the lessee had taken possession and had the power of actually occupying when he pleased.

But in the present case the defendant Tozer has never occupied by himself, and if the occupation of the defendant Underhay does not affect him, he has never occupied at all. We therefore think he is not liable at all in this form of action.

We do not say whether he might or might not be liable jointly with his co-executor in their own right, even without entry by either, to an action of debt for rent accruing due after the testator's death, as the term vested in both by operation of law, (for after accepting the executorship neither of them could waive the term, and the liability to pay rent is incident to the term). All we decide is, that he is not liable to an action for the *use and occupation* of that of which neither he, nor any one whose act is in point of law his act, has been in the actual possession.

For these reasons we think that the rule must be absolute to enter a nonsuit.

Rule accordingly (c).

(a) 8 T. R. 327.

(b) 4 Taunton, 45.

(c) See *Reid v. Lord Tenterden*, ante, 111, and *Tremere v. Morison*, 1 Bing. New Cases, 89, subsequently reported; *Rubery v. Stevens*, 4 Bar. & Adol. 241.

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GREENSLADE *against* TAPSCOTT.

A lessee covenanted to pay an additional rent for every acre, and so in proportion for a less quantity of the land which he should "suffer to be occupied" by any other person without the consent of the landlord. The lessee permitted his labourers to raise a crop of potatoes on small portions of the land demised between harvest and seed time, according to the custom of the country. Held, that he was liable to pay the additional rent, though the lease contained a covenant that the tenant should use "and occupy," dress and manure the land, according to the custom of the country.

ASSUMPSIT on an agreement bearing date 4 July 1828, by which the plaintiff agreed to let and the defendant to take "the estate at *Pariton*, then in the occupation of *J. and T. Rew* for seven years from the 29 September then following, the lease to be drawn in the precise terms of the lease then existing dated 1 December 1823, from *Joanna Lyddon* and the plaintiff, to the said Messrs. *Rew*, for five years thence ensuing, with some exceptions mentioned." Several breaches were assigned in the declaration, but that in question arose on a stipulation in the former lease, "that the said *J. and T. Rew* should yield and pay yearly during the said term, in addition to the said annual rent of 85*l.*, unto the said plaintiff, the further yearly rent of 10*l.* of lawful *British* money for every acre (*a*), and so in proportion for any less quantity of any part of the premises which he should let, assign, or demise, or suffer to be occupied by any other person, without the consent in writing of the said plaintiff first obtained." There was another covenant "that the said *J. and T. Rew* would not commit waste," but, "on the contrary, use, occupy, dress, and manure the premises in manner aforesaid, and according to the custom of the country and rules of good husbandry." Breach, "that the said defendant, during the continuance of the said term, to wit, on 25 March 1833, did let and demise to certain persons, and did suffer to be occupied by such persons from the day and year last aforesaid, up to and until the 29th day of September in the year last aforesaid, divers, to wit, three acres of land, parcel of the said premises, in certain parts and proportions, by such persons respectively, that is to say, (describing the quantities occupied by each,) without

(a) See *Denton v. Richmond*, ante, Vol. III. 634.

the consent in writing of the said plaintiff first obtained ;" whereby, &c. The second count laid the demise as a tenancy from year to year, subject to the same terms. Plea: general issue. At the trial before *Williams B.* at the last assizes for the county of *Somerset*, it appeared that the portions in question were let out in patches to persons in the neighbourhood for potatoes, who gave up the occupation after that crop was got in, and wheat was then sowed by the defendant. Evidence was given to show that it was the custom of the country for farmers to prepare their land for the next crop, and then permit their labourers to raise a crop of potatoes on it before the seed time. The learned baron, in addressing the jury, said, that when parties enter into any precise contract, the custom of the country is not applicable to such cases, except as to that which is not in the contract. That as it was proved that a certain rent was paid for a certain portion of the premises for potatoes, there was, in his opinion, a clear breach of that agreement. The jury found a verdict for plaintiff on this breach with 15*l.* damages, the increased rent for three acres. *Coleridge Serjt.* having obtained a rule for a new trial on the ground of misdirection,

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Follett (Wilde Serjt. with him) showed cause. The defendant suffered the land to be occupied by other persons without the consent in writing of the plaintiff. The parties plant potatoes and take the crop, and during that time the land is in the occupation of the party whose crop it is; he could bring trespass during such occupation. [*Parke B.* If I pass over part of the field where the potatoes were, though I do not tread on them, the person to whom the crop belonged would be the party to sue. *Alderson B.* The parties might have gained a settlement by such occupation (a).]

(a) Under 13 & 14 C. 2. *Rex v. Brampton*, 4 T. R. 349.

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Coleridge Serjt. and *Ball* in support of the rule. The test is not whether the person was an occupier or not, but whether this was such an occupation or underletting as was within this lease. As in *Doe d. Pitt v. Laming* (a) where there was a covenant not to let, "or otherwise part with" the premises, which were a coffee-house, and it was shown that a clerk had lodged there for a twelve-month, in a room of which he had the exclusive possession; Lord *Ellenborough* held, that the covenant could only apply to such an underletting as a licence might be expected to be applied for (b). [*Parke* B. The expression is equivocal in that case, it is "that he had lodged in the room:" if a stranger had broken in, he could not have maintained trespass.] The principle of *Doe v. Laming* applies here; many strong words in contracts are often construed, not literally, but according to the intent of parties. A tenant's depositing a lease with his landlord, a brewer, as a security for supplies of beer, is not a breach of covenant not to assign or "otherwise part with the premises demised" or the lease, *Doe d. Pitt v. Hogg* (c). Here we learn that the custom of the country was for the landlord to dress the land, and allow his labourers to put in potatoes as a cleansing crop between his two grain crops: the labourers had nothing to do with the land, but only to put in the seed and drew the crop. The intent is shown by the subsequent stipulation, that the defendant is to occupy according to the custom of the country (d). *Dyer*, fol. 15, pl. 79, has this passage: "In every deed and condition, which are private laws between party and party, a reasonable and 'egal'

(a) 4 Camp. 73.

(b) Adding, Who ever heard of a licence from a landlord to let in a lodger?

(c) 4 D. & R. 226.

(d) Where an express stipulation is made by a lease, the custom of the country is excluded, though similar up to a certain point. *Roberts v. Barker*, ante, Vol. III. 945.

intention shall be construed, however the word may sound to a contrary understanding."

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PARKE B.—This is a breach of the agreement. The stipulation is in extensive terms, that "for every acre, and so in proportion which the defendant should let, assign, or demise, or suffer to be occupied by any other person," he engaged to pay an increased yearly rent of 10*l*. Perhaps it would not fall within the agreement not to let, assign, or demise; but here the words are, shall not "suffer to be occupied." It is impossible to say that this use of the land by the parties does not fall within that description. If trespass was committed on the land, this occupier would be the person to bring an action, and he might gain a settlement by such possession. As to the cases cited, *Doe v. Hogg* is distinguishable. It may be difficult to distinguish the present case upon principle from what Lord *Ellenborough* said in *Doe v. Laming*: but its facts are materially different: in that case a clerk occupied a room in a public coffee-house, and unless there was a distinct agreement by his landlord to let him hold a particular room, he was not such a tenant as could bring trespass, and if he was a guest he could not. Had the room been actually demised for a particular term, it might have been such a "demise of some part of the premises" as to amount to a breach of the covenant: but as he was only a lodger it did not. The ground taken by Lord *Ellenborough* for his decision is not satisfactory to my mind (a).

BOLLAND B.—Cognisant as the lessor was of the custom of the country, it seems to have been his intention not to suffer that sort of occupation which it authorized. Notwithstanding the close resemblance of *Doe v. Laming* it is safer to give its usual sense to the word

(a) And see *Roe v. Sales*, 1 M. & Sel. 298.

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occupation. As during the time it lasted, the agreement would have vested the party with the right to bring an action against a trespasser, this rule should be discharged.

ALDERSON B.—The words “according to the custom of the country” relate to the mode of cultivation, but that custom which is here found may have occasioned the covenant to be introduced, that the lessee should not suffer the land to be occupied without leave, nor could more apt words be used to prevent it. An occupation of land from *Easter to October* for planting potatoes was held to give a settlement; *Rex v. Ringwood* (a). So, in *Rex v. West Cramore* (b), an occupation of so many lugs of land to take a crop of potatoes from, was held to be a renting of land of a yearly value to give a settlement. If we substitute “yards” for “lugs,” that case is exactly the present. The party has suffered the land to be occupied without the consent of his landlord in writing. *Doe v. Laming* may well be supported on the particular facts, but Lord *Ellenborough* presents no distinct criterion at all, and I do not go the length he does in his judgment.

Rule discharged (c).

(a) 1 M. & S. 381.

(b) 2 M. & S. 132.

(c) See *Comyn's Landlord and Tenant*, 2 ed. 234; *Church v. Brown*, 15 Vesey, 265; *Seers v. Hind*, 1 Vesey, 294; and *Crusoe v. Bugby*, 3 Wils. 234, S. C. Bla. R. 766, relied on by *Bayley J.* in *Doe v. Hagg* above cited, to show that if a lessor does not provide in his lease against a change of occupancy as well as an assignment by words which admit of no other meaning, the lease is not forfeited by the lessee's grant of an underlease. *Doe d. Holland v. Worsley*, 1 Camp. 20. per Lord *Ellenborough*, is contra.

SHEPHERD and Others, Assignees of PLUMMER,
against KEATLEY.

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ASSUMPSIT for the breach of a contract entered into between the plaintiffs as assignees and the defendant, for the purchase by him of a leasehold estate. The declaration contained three special counts on the contract, and an indebitatus count for a leasehold estate bargained and sold, with the money counts and a count on an account stated. Plea, non assumpsit; upon which issue was joined. By consent of the parties, an order of a judge was obtained for the statement of the following case for the opinion of the court, pursuant to 3 and 4 Will. 4. c. 42. s. 25 (a).

By indenture dated 21st March 1816, between *J. C. Croke* of the first part, *J. Ellison* of the second part, *H. Bates* and *S.* his wife, and *J. H. Bates* their son, of the third part, and *J. Plummer* of the fourth part; after reciting that the said *J. C. C.*, *J. E.*, *H. B.*, and *S.* his wife and *J. H. B.* were seised of and entitled to the messuage or tenement and other hereditaments and premises thereafter particularly mentioned, and agreed to be demised, in the shares and proportions following; that is to say, (here were detailed the shares of the lessors as tenants in common, with a recital of intended improvements by *J. P.*) It was witnessed that in pursuance of a licence for that purpose granted from the lord of the manor of *Vauxhall* in the county of *Surrey*, and in consideration of the sum of £, so to be laid out by the said *J. Plummer*


By the conditions of sale of leasehold premises, the vendors stipulated that they should deliver an abstract of the lease and of the subsequent title under which the leasehold lots were held, but should not be obliged to produce the lessor's title.

The defendant became the purchaser, and on investigating the title for himself, it appeared to be defective, and he refused to complete the purchase: Held, that the purchaser was not concluded from inquiring aliunde into the lessor's title, by the stipulation that the vendors should not be obliged to produce it.

Entering judgment on special case heard, pursuant to 3 & 4 W. 4. c. 42. s. 25.

(a) Enacting, that the parties may after issue joined, by consent and order of any judge, state the facts in a special case for the opinion of the court, and agree that a judgment shall be entered for plaintiff or defendant, by confession or of nolle prosequi, immediately after the decision of the case, or otherwise as the court may think fit, and judgment shall be entered accordingly.

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in manner before mentioned, and of the rents and covenants thereafter contained, they the said parties on the first, second, and third part, did each and every of them, according to his part, share, or interest &c. in the premises, demise &c. unto the said *J. Plummer*, his executors &c., the said tenements and premises therein mentioned, for 50 years, at a yearly rent of 50*l.*, to hold the same unto the said *J. Plummer* without any deduction for land tax. The indenture mentioned contained a proviso that he the said *J. Plummer*, his executors &c. and assigns, should be at liberty to underlet the premises, or any part thereof, or to assign the term thereby granted to any person who should become party to an indenture and thereby enter into the said covenants and agreements with the said *J. C. C.*, *J. E.*, *H. B.*, and *S.* his wife, and *J. H. B.*, their respective heirs and assigns, as were contained in the said indenture. The case then stated, that on 2d *December* 1830, a commission of bankrupt issued against *J. Plummer* and *W. Wilson* as co-partners, and they were duly declared bankrupts. That by indenture of 3d *December* 1830, the commissioners duly appointed *J. Johnson* provisional assignee, and that afterwards the plaintiffs were chosen assignees, and on 17th *December*, by indenture between the provisional assignee, the commissioners, and the plaintiffs, the right and title of the bankrupt in his estate was assigned to the plaintiffs. That since the commission of bankruptcy *J. C. Crooke* has died, and his shares of the rent since accruing have been paid to his widow under protest. That since the commission *H. Bates* has died, and his shares of the rent have been since paid to his widow. On 11th *May* 1831, the plaintiffs put up for sale by auction (among other property) the said premises demised by the indenture of 21st *March*

1816, for the residue of the term of 50 years, subject to, among others, the following conditions of sale :

The purchaser to pay down immediately a deposit of 20 per cent. in part of the purchase money, and sign agreements for payment of the remainder on or before the 24th day of *June* 1831, but should the completion of the purchases be delayed from any cause whatever beyond that period, the purchasers to pay interest at 5l. per cent. per annum from that time on the balance of the purchase money, and be entitled to the rents and profits of such of the lots as are let from the said 24th day of *June*. That the vendors should deliver an abstract of the lease and of the subsequent title under which the leasehold lots are held, but shall not be obliged to produce the lessor's title. The defendant became the purchaser of the premises at the sale, paid down the deposit of 20l. per cent., and signed an agreement for the payment of the remainder and the completion of the purchase according to the conditions of sale. The plaintiffs delivered an abstract of the lease and of the subsequent title under which the premises were held, and tendered to the defendant a certain indenture of assignment purporting to assign the premises to him for the residue of the said term of 50 years, but the defendant refused to accept the same. On investigating the title of the vendors on the part of the defendant, he contended that it was insufficient. It appeared that the demised premises were, at the time of executing the said lease, copyhold of inheritance, and a customary tenement of the manor of *Vauxhall*, in the county of *Surrey*, in which by custom any estate or interest in a copyhold tenement may be demised for a term exceeding one year, provided the previous licence of the lord in writing, for the granting the lease, has been duly obtained, but without such licence, by the custom of the said manor, a lease for the term of

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more than one year is cause and ground for forfeiture of the demised estate to the lord. *J. C. Crooke*, one of the lessees, had only an estate for life in the demised premises under a settlement made on his marriage with *Elizabeth Parry*, dated 14th March 1776, with a power to lease the said premises by indenture of lease under his hand and seal, and subscribed and sealed by him in the presence of two or more credible witnesses. The lease in this case was, as to his signature, witnessed only by one witness; the power is in the words following: (set out) by which it appeared that *J. C. Crooke*, during his life, and his wife, if she survived him, and *T. Pritchard* and *R. Whishaw*, their heirs, executors, and administrators, after the death of *J. C. Crooke* and his wife, and during the minority of the children by the marriage, might by indenture under their hands and seals respectively subscribed and sealed by him, her, or them, in the presence of two or more credible witnesses, demise any parts of the said premises &c., to any persons, for any number of years, without taking any fees, at the most improved yearly rent, payable quarterly or half yearly, so that no such lease be made dispunishable of waste by any express words, and so that a condition of re-entry for non-payment of rent be contained in it, with all usual covenants, and so that the lessees seal and deliver counterparts of all such leases. The said *J. E.*, another of the lessors, before obtaining the licence to demise, and before executing the said lease, viz., on 17th November 1814, duly surrendered all his estate and interest in his fourth part of the demised premises, on his marrying *Susannah Smith*, to trustees, *J. H. Bates* and *G. Whittingham*, in fee in trust for himself for life with remainders over; and the said trustees were on 10th November 1815 duly admitted, and the said *J. E.* had no legal estate or interest in the premises at the time of his executing

the said lease. The licence from the lord of the manor for *J. C. C.* and *J. E.* to demise, was dated 1st *April* 1815, and only for a term not exceeding 40 years from *Lady-day* then next; but the lease was granted for a term of 50 years from *Michaelmas* then last, (1815.) (The copy of the licence was here set out.) No licence was obtained for the said *Sarah B.* and her son *J. H. B.* in her own right, nor for *J. H. B.* and *G. Whittingham* as the trustees of the said *J. E.*, to execute the said lease, or otherwise to demise their interests or either of their interests in the said premises for any term whatsoever. At the time defendant signed the said agreement of purchase, the said *Eliz. C.* widow of the lessor *J. C. C.*, was legally entitled to an estate for life only, under the settlement of 14 *March* 1776, with power of leasing; and on 3d *August* 1831, her solicitor wrote to the defendant's solicitors a letter, stating that the validity of the lease to *J. Plummer* was questioned by *Mrs. C.* the tenant for life of an undivided moiety of the property. But no proceedings have been taken in consequence.


The defendant therefore refused to complete his contract, contending that the lease was invalid, and that no perfect and secure legal title to hold the premises for the residue of the said term of fifty years, could under the circumstances be assigned to the assignees, or by them to him.

The plaintiffs contend, that the points raised by the defence have relation solely to the title of the lessor's not appearing on the abstract of the lease itself, and that they cannot be entertained under the conditions of sale, which bind them only to deliver an abstract of the lease, and of the title subsequent thereto, without regard to the title of the lessor, and that it is not open to the defendant upon this contract to go into the landlord's title.

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If the court should be of opinion that the plaintiffs are entitled to recover, defendant agrees that a judgment shall be entered against him by confession immediately, or otherwise as the court shall think fit. If the court should be of opinion that the plaintiffs are not entitled to recover, then the plaintiffs agree that a judgment shall be entered against them of nolle prosequi immediately after the decision of the case, and otherwise, as the said Court shall think fit.

D. Maclean for the plaintiffs. The assignees have acted bonâ fide, and done all that a court of law requires; the defendant cannot refuse to complete the purchase on account of a defect in the lessor's title, which does not appear in the abstract. The title of the plaintiffs rests on the lease of 1816; this is all they were bound to show, and they have tendered that. [Lord *Lyndhurst* C. B. The plaintiffs were not bound to produce the lessor's title, and they contend that they have produced an abstract to the extent which was necessary. The defendant does not want them to produce the title, but has other evidence to show that the lessor had none.] The plaintiffs are within the range of the case of *Spratt v. Jeffery* (a), in which the defendant, having bargained to sell two leases "as he then held the same," the plaintiff agreed to accept an assignment, "without requiring the lessor's title." *Bayley* J. said, "The fair and reasonable construction of those words is, that the buyer shall not be at liberty to raise any objection to the lessor's title." *Parke* J. says, "The words 'as he now holds the same' are ambiguous, but the plaintiff contracted to pay for an assignment, without requiring the lessor's title. The plaintiff contends that he is nevertheless at liberty to object to the lessor's title, although the contract does

(a) 10 B. & C. 249.

not bind the defendant to produce it; but this is an unreasonable construction, and cannot be sustained. [Lord *Lyndhurst* C. B. There the agreement was by the vendee, to accept an assignment of the leases, "without requiring the lessor's title;" this is different from a stipulation that the vendor shall "not be called on to produce it."] If the words were used to give protection to the vendor, they cannot have a different interpretation; either expression shows that the vendor intended to convey only such estate as he had, and would be a sufficient caution to a buyer that his title was not free from suspicion. It was long doubted in equity whether the vendee of a leasehold interest could, without condition, call on vendor to prove the lessor's title. It was not settled till the case of *Purvis v. Rayer*(a), that on a sale of leasehold property without a stipulation to the contrary, the vendor is bound to show to the satisfaction of the purchaser, that the lessor was entitled to grant the lease. [Alderson B. The court does not say that the plaintiffs are not saved from that by the conditions, but that the other side may prove the contrary. Lord *Lyndhurst* C. B. Does it prevent a party from availing himself of information from any other source? *Spratt v. Jeffery* was decided on the inference which the Court drew from the words themselves; they held, that the words "without requiring the lessor's title," meant waiving all defects in the title.] The cases only show that now the vendee may avail himself of defects in the lessor's title, in the absence of a stipulation to the contrary; here is such a stipulation, under which the vendee could be compelled to complete the purchase according to *Denew v. Deverill*(b). That was an action by an auctioneer against his employer the vendor, for his commission; he had neglected to insert a clause

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(a) 9 Price, 488.

(b) 3 Camp. 451.

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to this effect in the conditions of sale, and owing to that the contract went off. Lord *Ellenborough* said, "A practice has very properly sprung up among auctioneers, in selling leasehold property, to insert a clause in the particulars of sale, that the vendor shall not be called on to show the title of the lessor; had that been done the defendant would have been secure." [Lord *Lyndhurst* C. B. The declaration of Lord *Ellenborough* must be taken with reference to the circumstances; had there been such a stipulation there, the vendor might perhaps have been compelled to complete the purchase, but then it does not appear as here, that he was prepared with evidence to show no title in the lessor.] In *White v. Foljambe*(a) the sale went off, because the title produced did not correspond with that contracted for; and *Deverell v. Lord Bolton*(b) was decided on its particular circumstances. [Bolland B. In *White v. Foljambe* the lessee had no power, after the lease was executed, to insist on the production of his lessor's title.] The general rule is, that "if a purchaser of a leasehold estate had notice, at the time he entered into the contract for purchase, of the vendor's inability to produce the lessor's title, he would not be afterwards allowed to insist on its production"(c). [*Alderson* B. The only question is, whether, though the vendor is not compelled to produce the lessor's title, the vendee is prevented from showing that the lessor has none?] There is nothing on the face of the lease to prove that the party demising had no title; the defendant bought it with all its infirmities, and if evidence aliunde is admitted, it is in the face of *Spratt v. Jeffery*. [Lord *Lyndhurst* C. B. In *Spratt v. Jeffery* the words may, without much violence, be understood to mean without "requiring a title in the

(a) 11 Ves. 337.

(b) 18 Ves. 503.

(c) Sugden's Vend. and Purch. 8th edit. 312.

lessor," but in this case, where the words merely relieve the plaintiff from being called on to produce his title, why may not the defendant produce another from elsewhere? If that agreement amounts to a waiver of title, it justifies the judgment, but I cannot bring myself to think that a stipulation that the vendor should not be obliged to produce the lessor's title, amounts to that.] The Court will not be too astute in putting a particular sense on particular words, where the intention of the parties can be collected without encumbering them with the technical meaning, *City of London v. Dias*(a). [Gurney B. The vendee only stipulates that he will not call on you to produce the title. It is the vendor who is always called on to produce the title; a stipulation that exempts him from that, is intended to keep the title out of view altogether. Lord Lyndhurst C. B. It is stated in the case on the part of the vendee, that the title contained certain defects; I do not know where he got that knowledge.] The defendant bought the premises with the risk, no doubt they sold for less with that stipulation.

*Platt* for the defendant. The argument for the plaintiffs is built on the words used in *Spratt v. Jeffery*; but there is a distinction in the two cases with reference to the subject of sale, and the terms of the sale. In *Spratt v. Jeffery* the subject was, "two leases, as the vendor holds the same;" here it is, "certain premises." Then the words, "without requiring the lessor's title," are stronger than "but the plaintiff should not be obliged to produce the lessor's title." [Lord Lyndhurst C. B. It is very inconvenient to the lessee to produce the lessor's title; this is a sufficient reason for the stipulation, without adopting the plaintiffs' construction.] Suppose a lease for years, and a

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(a) Woodfall's Landlord and Tenant, 301; edit. 1831.

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forfeiture occurs before the end of the term, and upon that a re-entry, but that the lessee still holds the parchments, it cannot be contended that if he should put up the forfeited term for sale, with a stipulation that he should not be obliged to produce the lessor's title, the purchaser should pay for nothing. If not, this case cannot be decided for the plaintiffs.

LORD LYNTHURST C. B.—The question turns on the meaning of the following words in the conditions of sale:—"The vendors shall deliver an abstract of the lease, and of the subsequent title under which the leasehold lots are held, but shall not be obliged to produce the lessor's title." It appears to me that the meaning of these words is nothing more than that as far as the vendor is concerned, he shall not be called on to produce evidence of that title for the satisfaction of the purchaser; but that they do not estop the vendee from proving that title to be bad, if he has means to do so aliunde. A stipulation in these terms is commonly introduced to avoid the inconvenience which would arise to a lessee on selling his lease, if he was obliged to prove his lessor's title. As to *Spratt v. Jeffery*, without saying what decision I should have arrived at in such a case, it is sufficient to say that the words there decided on "without requiring the lessor's title," are very different from these. Those words might mean the waiving all objections to the lessor's title, and the King's Bench were of that opinion. But there is nothing here to show such an intention, and it is sufficient to say that upon these expressions the vendor should not on his side be required to produce evidence of his lessor's title.

BOLLAND B.—It is sufficient to say that these words differ from those in *Spratt v. Jeffery*, and are not governed by it. As it might be inconvenient or impos-

sible to the assignees to produce it, they wisely prevented the necessity to do so. It appears that there were objections to the lessor's title, though they were not shown by the vendor. Nothing in those words prevented the lessee from procuring information aliunde that the title was bad, as, for instance, the insufficiency of the attestations to *Crooke's* execution of the power, and the defect in the licence.

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ALDERSON J.—I am of the same opinion. *Spratt v. Jeffery* must have been decided on the ground that the contract there amounted to a waiver of objection to the lessor's title altogether, and not merely to a production of it in evidence. I doubt if the decision could be supported on any other ground. Mr. Justice *Littledale* there said, the main difficulty arises from the words, "without requiring the lessor's title." Taking the agreement together, I am disposed to think that the defendant contracted to sell a qualified title only. He rested his judgment on the ground that as nothing was said in the contract about the leases being granted under a power, the meaning of the words, "without requiring the lessor's title," probably was, that the title of the party who actually granted them should not be inquired into. That is the principle on which to rest that decision. It is unnecessary to say whether I should have concurred in the construction of those words, for they differ materially from these, but I agree in the principle as true. Applying it here, the vendors are at liberty to enforce a contract against the purchaser, without producing evidence of the lessor's title, but that cannot prevent the other side from proving that the lessor could not grant the lease.

I should also remark, that this being a case brought before us under 3 & 4 *Wm. 4. c. 42. s. 25.*, there appears to be a plea of the general issue. Now, as by

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the new rules this defence could not be raised on that plea, if pleaded after *Easter* term(a), the pleadings must be amended, or the judgment must be for the defendant.

GURNEY B. concurred, saying, that if the vendor of a lease intended to protect himself against showing a good title in his lessor, he should use unambiguous language.

The Court then, on the prayer of *Platt*, directed judgment of nolle prosequi to be immediately entered.

(a) It turned out to have been pleaded before *Easter* term.

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### TOOGOOD *against* SPYRING.

The agent of a landlord employed the plaintiff to do work at the house of the defendant, who was a tenant on the estate. The plaintiff did it improperly, and got drunk during the time he was engaged in it. Several circumstances took place which induced the defendant to believe the plaintiff had broken open his cellar-door and got access to his cider. Two days after, the defendant saw the plaintiff in company of T., a fellow-workman, and charged him with having broken his cellar-door, got drunk, and spoiled the work. The defendant afterwards repeated the charge to T. in the plaintiff's absence; and on the same day complained to the agent that the plaintiff had spoiled his work and had got drunk, that his cellar-door had been broken open, as he believed, by the plaintiff. Held, first, that the complaint to the agent, if *bonâ fide* made, and without malicious intention to injure the plaintiff, was a privileged communication.

Secondly, that the uttering the words to the plaintiff, though in the presence of T., was similarly privileged, if done honestly; for that the circumstance of its being made in the presence of T. did not of itself make it unwarranted and officious, though that circumstance with others, *e. g.* the style and character of the language used, might be left to the jury to determine whether the defendant acted *bonâ fide* in making the charge, or was influenced by malicious motives in seeking an opportunity to make it before a third person.

Thirdly, that the statement to T. in the plaintiff's absence was unauthorized and officious, and therefore not protected, though made in the belief of its truth, if it turned out to be in point of fact false; and that it should be left to the jury whether defendant acted maliciously or not on that occasion.

of the grievances by the defendant as hereinafter mentioned, had been and was a journeyman carpenter, and accustomed to employ himself as such, and to gain his living by that employment; and had been and was at the time of committing of the grievances by the defendant, as hereinafter mentioned, retained and employed by and in the service of one *J. Brinsdon*, as his journeyman carpenter and workman, at and for certain wages and reward by the said *J. B.* to him, and in that capacity and character had always behaved and conducted himself with honesty, sobriety, and great industry and decorum, and never was, nor until the time of the committing of such grievances, suspected to have been or to be dishonest, drunken, dissolute, vicious, or lazy; to wit, in &c.: By means of which several premises the plaintiff before the committing of the said grievances had not only deservedly gained the good opinion of all his neighbours, masters and employers, but had also derived and acquired for himself divers great gains, maintenance, and support, and would have thereby continued to derive and acquire other great gains, maintenance and support, but for the commission of the grievances hereinafter mentioned, to wit, in &c. That the plaintiff, before the time of the committing of the grievances in the 1st and 2d and last counts of this declaration mentioned, had been employed by the said *J. Brinsdon* as his workman and journeyman, in and upon certain work, to wit, in and about certain premises of the defendant, and then and thereupon and throughout that occasion, and during the whole of the plaintiff's work in and about the same, had behaved &c. with honesty, sobriety, and great industry, and in a proper and workman-like manner: Yet the defendant, well knowing the premises, but greatly envying &c. and contriving to cause it to be suspected and believed that the plaintiff had been

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and was guilty of the misconduct thereafter stated to have been charged on and imputed to him by defendant, to wit, on &c. in a certain discourse which he the defendant then and there had with the plaintiff, of and concerning him the plaintiff, and of and concerning him with reference and in relation to the aforesaid work, in the presence and hearing of divers good and worthy subjects of our lord the king, then and there in the presence and hearing of said last-mentioned subjects, falsely and maliciously spoke and published to and of and concerning the plaintiff, and of and concerning him with reference and in relation to the aforesaid work, the false, malicious, and defamatory words following; that is to say, "What a d—d pretty piece of work you (meaning the plaintiff) did at my house the other day." And in answer to the following question then and there in the presence and hearing of the said last-mentioned subjects, put by the plaintiff to the defendant, that is to say, "What, sir?" then and there in the presence and hearing of the said last-mentioned subjects, falsely and maliciously answered, spoke, and addressed to and published of and concerning the plaintiff, and of and concerning him in relation and with reference to the aforesaid work, these other false, scandalous, malicious, and defamatory words following; that is to say, "You broke open my cellar-door, and got drunk, and spoiled the job you were about;" meaning the aforesaid work.

The second count stated these words:—"He (meaning the plaintiff) broke open my (meaning the defendant's) cellar-door, and got drunk and spoiled the job, he (meaning the plaintiff) was about," (meaning the aforesaid work).

The 3d count,—“What! I?” (meaning the plaintiff). “I will swear it (meaning thereby that he the defendant would make oath that the plaintiff had

broken into his cellar), and so will my (meaning the defendant's) three men."

The 4th count.—That in a certain other discourse which the defendant had with a certain other person, to wit, one *R. Taylor*, of and concerning plaintiff, in the presence and hearing of the said last-mentioned person, and of divers other good &c. subjects &c., and in answer to a certain question whereby the last-mentioned person, to wit, the said *R. T.*, did then and there in presence and hearing of other last-mentioned person, and of divers other good and worthy subjects, interrogate and ask of the defendant whether he the defendant meant to say that the plaintiff had broken into the cellar of the defendant; he the defendant then and there in the presence and hearing of the last-mentioned subjects falsely and maliciously answered, spoke, and published to the last-mentioned person, to wit, the said *R. T.*, and in his presence and hearing, these other false, scandalous, malicious, and defamatory words, of and concerning the plaintiff, that is to say, "I (meaning the defendant) am sure he (meaning the plaintiff) did (meaning that he the plaintiff had broken into his defendant's cellar); and my (meaning the defendant) people will swear it."

Special damage, that by means of the premises the said *J. Brinsdon*, who before and at the time of the committing of the said grievances had retained and employed, and otherwise would have continued to retain &c. the plaintiff as journeyman, workman and servant, for certain wages and reward, to be therefore paid to the plaintiff, afterwards, to wit, on &c. discharged the plaintiff from his service and employ, and wholly refused to retain and employ the plaintiff in his said service and employ; and the plaintiff hath from thence hitherto wholly by means of the premises,

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and from no other cause whatever, remained and continued and still is out of employ.

One of the counts was for speaking the words to *Brinsdon*.

Pleas : first, general issue. Secondly, that before the committing of the grievances, to wit, on, &c. the said plaintiff broke open a door of a cellar of said defendant, in house of said defendant, and then and there broke into said cellar, got drunk and spoiled said work in said declaration mentioned : Wherefore the said defendant did speak and publish the said words as in said declaration respectively mentioned, of and concerning and relating to said house, and said cellar, and cellar-door, as he lawfully might, for cause aforesaid.— Verification.

Thirdly, as to the first, second, and last counts of declaration, and also as to the speaking and publishing the following words, that is to say, “ I am sure he (meaning plaintiff) did ” (meaning said plaintiff had broken into his, defendant’s cellar), as in said 4th count mentioned ; the said defendant says that, heretofore and before the committing of any of the grievances in the introductory part of this plea mentioned, or any part thereof, to wit, on 7th *January* 1834, said plaintiff broke open the door of a cellar of said defendant, in the house of defendant, and then &c. broke into said cellar, got drunk and spoiled said work in declaration mentioned. Wherefore &c. Verification. Similiter and Replication of de injuriâ to the second and last plea.

At the trial before *Bosanquet J.*, at the *Lent* assizes for *Devonshire*, the following facts appeared. *Brinsdon* was a master carpenter overlooking works for the earl of *Devon*, at *Powderham Castle*, and had employed the plaintiff as a journeyman. The defendant was a tenant on the estate, and had required some repairs to be done at his house ; they were doing by *Brinsdon’s*

directions, by the plaintiff and another. On the day in question *Brinsdon* had ordered them to put up a new door on a place adjoining the cellar, under the defendant's superintendence. It had been cut too small for the purpose. After leaving *Brinsdon's* shop the plaintiff got drunk, and other facts appeared sufficient to make the defendant believe that in his absence the plaintiff had broken open his cellar-door and got cider out. *Brinsdon* disapproved the way the door had been cut. Two days after, when the plaintiff was at work with *Taylor* a mason, the defendant said to the plaintiff in *Taylor's* hearing, "what a d—d pretty piece of work you did at my house the other day;" plaintiff asked "What sir?" The defendant replied, "You broke open my cellar-door, got drunk, and spoiled the job you were about." The plaintiff denied, but defendant said "you did it with a chisel, and my three men will swear it." He then asked where *Brinsdon* was, and went to seek him. Defendant was afterwards asked by *Taylor*, in the absence of the plaintiff, whether he really thought the plaintiff had broken the cellar-door? he answered, "I am sure he did, and my men will swear it. It is a sad thing that a man cannot be entrusted to go to work without committing these depredations." He afterwards saw *Brinsdon* that day, and told him *Toogood* had spoiled the new door; and that the cellar-door had been broken open with a chisel, and that he believed *Toogood* must have done it, for he had got drunk. Upon this, *Brinsdon* told the plaintiff that he could no longer be in his employ till the matter was cleared up. *Brinsdon* with the plaintiff and defendant examined the cellar-door next day, the bolt was broken, and the joint might have parted, but it was doubtful whether it had been done on the occasion in question. *Brinsdon* said he thought the charge was not made out, and that the plaintiff

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might go to work again if he liked. The plaintiff said his character was not cleared, and did not. The learned judge told the jury that if the charge against the plaintiff was true, the defendant would have been justified in going to *Brinsdon* at once, as the plaintiff's employer; but that as the words were spoken on the first occasion, not by way of complaint to him, and in the presence of *Taylor*, he thought the plaintiff entitled to maintain his action. He also said that the defendant was not justified in uttering the words to *Taylor* on the subsequent occasion in the plaintiff's absence. He then directed them that if they thought the plaintiff had broken open the cellar-door, their verdict should be for the defendant; if they thought it not, or if they thought the charge not entirely true, and thought the communication made to *Brinsdon* not justified by the circumstances, their verdict must be for the plaintiff. The plaintiff had a verdict for 40*s.* damages, leave being reserved to move to enter a nonsuit.

*Follett* in *Easter* term, moved for a rule to show cause why a nonsuit should not be entered, or a new trial be had, on two grounds:—first, that under the circumstances, the defendant being interested in the work to be done by the plaintiff, the words spoken were a privileged communication; and, secondly, for misdirection.

*Praed* (*Coleridge* Serjt. with him) showed cause. First, even if the words complained of might have been uttered to the employer *Brinsdon* as a privileged communication, the defendant could not justify using them to the plaintiff in the presence of a third person, before he had made any intimation of it to *Brinsdon*. In

*Macdougall v. Claridge* (a), the plaintiff charged the defendant, in a letter to third persons, with mismanaging their concerns, he being himself interested in them; and Lord *Ellenborough*, in laying down that no action would lie, expressly rested that opinion on the ground that such a communication as was there made was not intended to go beyond those immediately interested in it. The communication to *Taylor* when alone cannot be said to be in any sense privileged. Even if the defendant had a right to complain to *Brinsdon* that the plaintiff's work was ill done, he had no right to charge him with breaking the door and getting drunk, for that amounted to a charge of felony; and though the declaration does not contain an inuendo that the defendant meant to impute felony, yet as special damage was laid and proved, such an inuendo was unnecessary; *Moore v. Meagher* (b). [*Parke* B. No special damage was found here, the damages given were general. The plaintiff did not show himself to be removed from a beneficial employment, or even to have lost his wages for the time he was suspended.] There was evidence that on the first day *Brinsdon* said he would not continue to employ the plaintiff until his character was cleared, and though he told him next day he might go to work again, the plaintiff said his character was not cleared, and that he would not. On this proof the jury were justified in finding special damage to the amount of 40s., even if plaintiff were only a day out of employment. Secondly, there is no ground for a new trial, as the case was properly left to the jury; for malice against the plaintiff might be inferred from the circumstances. *Dunman v. Bigg* (c) shows that in cases of communications said to be privileged as confidential, it is for the jury to decide whether the

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(a) 1 Camp. 267.

(b) 1 Taunt. 39.

(c) 1 Camp. 269, n.

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defendant used the expressions in question with a malicious intent of injuring the plaintiff, or bonâ fide to communicate facts to a party which he was interested to know (a). Now malice might here be inferred from the uttering these words to the plaintiff in *Taylor's* presence, and afterwards to *Taylor* in his absence; for on neither occasion was the statement necessary or useful in order to obtain redress for the defendant. *Rogers v. Clifton* (b) shows, that though the law does not compel a master in general to prove the particulars given by him to a person applying for the character of his late servant to be true, yet if he officiously (c) state trivial misconduct of his servant to a former master, to prevent his giving a second character, and then himself gives him a bad character, which is disproved by the servant, malice may be inferred. The time, place, and manner of uttering the words are material to prove malice. As for instance, to charge a tailor before his other customers with selling me bad articles or spoiling a coat. Even had the defendant charged plaintiff with spoiling the work as well as breaking the door and getting drunk before a party who could redress the bad workmanship, that charge, even if made to *Brins-*

(a) In *Blackburn v. Blackburn*, 4 Bing. 405, *Gaselee J.* directed a jury to consider whether the defendant's letter was a confidential communication made bonâ fide in answer to inquiries instituted touching the plaintiff's conduct; and if so, whether it was or was not accompanied by express malice? for if it was, the defendant would be responsible, even though the court should be of opinion that the communication was privileged. If the jury should be of opinion that the communication was not called for, they would find for the plaintiff. Verdict for plaintiff damages 50*l.*, with a finding that he was not guilty of forgery, and that defendant was not actuated by express malice. The court of C. P. permitted the verdict to stand, and approved of the learned judge's direction.

(b) 3 Bos. & P. 587.

(c) See *Robinson v. May*, 2 Smith's R. 3; also, *Horne v. Lord F. Bentinck*, 2 Br. & B. 130; *Oliver v. Lord W. Bentinck*, 3 Taunt. 456; *Jekyll v. Morris*, 2 New R. 341.

*don*, exceeds the bounds of privileged communication, for it is equivalent to a charge of felony. It was not requisite to leave them to the jury to say whether the communication was *bonâ fide*, and therefore privileged or not. In *Godson v. Horne (a)*, *Richardson J.* said, "If a man giving advice calls another thief, surely it is not necessary to leave it to the jury whether such language is a confidential communication." Here, the defendant meant to complain of more than spoiling the job, and if he was justified in alleging the defendant to have done his work ill, as speaking of him in his trade, he still had no right to couple that charge with a collateral assertion, amounting to a charge of felony. All the words complained of were spoken at one time, and as relates to one matter, viz. on his employment in the defendant's house, and being laid as one thing, do not amount to a privileged communication. The same consequence arises if the charge of breaking open the cellar was not spoken of the plaintiff in his employment. It was the duty of the defendant to superintend the work and complain at the time (*b*).

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*Follett (Wilde Serjt. with him) contra*. The defendant is entitled to a new trial, for it should have been left to the jury to say whether the defendant was justified in using the expressions in question to *Taylor* as well as to *Brinsdon*. But the defendant is entitled to a non-suit, for this action will not lie as here framed, for charging the defendant with breaking open a cellar door without proof of special damage. Now the only

(a) 1 Br. & B. 7.

(b) He also mentioned *Hollins v. Donnelly*, tried at the *Dorchester assizes*, for words spoken of an *accoucheur*, imputing adultery to him. The defendant insisted that the words were not spoken of him in his business as an *accoucheur*. *Alderson J.* left it to the jury whether those were not words distinctly referring to the plaintiff's character as *accoucheur*, in relation to his trade or business as such.

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special damage laid was pecuniary, by dismissal from *Brinsdon's* employ. But he was not shown to have been ever actually dismissed or even suspended. He was told one day that if the matter was not cleared, he must not continue in the employ, and the proof was, that when on the next day, *Brinsdon* found it doubtful whether the door had been broken open, he said the plaintiff might go to his work again; so that if he did not do so, it was his own fault. The words were not spoken of him in his trade. [*Parke B.* May not they have been spoken of him not as a journeyman carpenter, but as imputing to him, that while employed in that capacity he committed felony? If there be enough on the record to show that felony was imputed, it would be enough, without proof of plaintiff's having sustained injury in his trade. He might avail himself of an opportunity in his business to commit a felony.] It is submitted that the charge of breaking open a cellar door is as wholly unconnected with his employment as a journeyman carpenter, as the charge of any breach of moral duty committed by him during such employ. Neither, therefore, could it be said to be spoken of the plaintiff in his trade or employment. It is not enough if the words were spoken of him during such employ as a carpenter, unless they were spoken of him as connected with his trade, and as acting in that particular capacity; and if doubtful, their meaning should be left to a jury. This verdict proceeded on the assumption that the words used imputed a felonious act. If it was meant to insist that they did, and not that they only imputed doing work ill, it should have been so laid in the declaration; for the act of breaking open the door might or might not be felonious, and was a question for the jury. Then the defendant was entitled to a verdict on as much of the declaration as charges him with doing the work negligently and improperly. [*Alderson B.* Is it not

actionable to say "you are an idle, dissolute workman; while you were employed for me you robbed me?" The first words give a complexion to the rest.] It was a question for the jury, whether the words were spoken of the plaintiff in his trade, and as they were not, the defendant has a right to a new trial. [*Parke B.* There is one connected proposition; can it be separated as if the words were not spoken of him in the course of his trade? They are spoken of his conduct in his trade, and represent it to be the reverse of that of a sober, industrious workman.] The jury found in effect that he was a bad workman; then the breaking open the door is put as an adjunct to or instance of that, and no damages could be given. The defendant has made out his justification by proving the truth of as much of his imputation as was applicable to him in his trade, and therefore actionable.

Next, as to this being a privileged communication, can the proposition be sustained, that the defendant had no right to complain to the plaintiff in the presence of a third person? Has not an employer or party interested in work a right to complain respecting it to the servant or workman in the presence of a third person, if not shown to do so *malâ fide*? If he has not, no master could reprove a servant, and no buyer a tradesman, except he could find them alone. [*Alderson B.* You say that so doing is only more or less evidence of malice, and that it is for the jury to decide on. But the communication to *Taylor* when alone, charged the breaking the door only, and the verdict is general.] The judge assumed that the defendant had no right to make this statement to the plaintiff in the presence of *Taylor*, without leaving it to the jury. But if from the circumstances proved the defendant may be taken to have really believed that what he said was true, and to have acted on that belief, he, as a party interested in

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the work, was justified in thus complaining to the workman himself, *Fairman v. Ives* (a); though he might find him in the presence of another person. That was a question of law upon which the judge should have nonsuited; for it is only when evidence is given to show that the party acted *malâ fide* that it becomes a question for a jury. The communications which have been held unjustifiable, were made to third parties, and not to the party himself.

Cur. adv. vult.

The judgment of the court was afterwards delivered by

PARKE B.—In this case, which was argued on *Friday* before my brothers *Bolland*, *Alderson*, and *Gurney* and myself, a motion was made for a nonsuit or new trial, upon the ground of misdirection. It was an action of slander for words alleged to have been spoken of the plaintiff as a journeyman carpenter on three different occasions. It appeared that the defendant, who was a tenant of the earl of *Devon*, required some work to be done on the premises occupied by him under the earl, and that the plaintiff, who was generally employed by *Brinsdon*, the earl's agent, as a journeyman, was sent by him to do the work; he did it, but in a negligent manner, and during the progress got drunk, and some circumstances occurred which induced the defendant to believe that he had broken open the cellar door and so obtained access to his cider. The defendant, a day or two afterwards, met the plaintiff in the presence of a person named *Taylor*, and charged him with having broken open his cellar door with a chisel, and also with having got drunk; the plaintiff denied the charges: the defendant then said he would have it cleared up, and went to

(a) 5 B. & Ald. 645. See ante, 590, n. (c).

look for *Brinsdon*. He afterwards returned and spoke to *Taylor* in the absence of the plaintiff, and in answer to a question of *Taylor's*, said he was confident plaintiff had broken open the door. On the same day the defendant saw *Brinsdon*, and complained to him that plaintiff had been negligent in his work, had got drunk, and, as he thought, had broken open the door; and requested him to go with him in order to examine it. Upon the trial it was objected that these were what are usually termed privileged communications, and the learned judge thought that the statement to *Brinsdon* might be so, but not the charge made in the presence of *Taylor*. And in respect of that charge and what was afterwards said to *Taylor*, both which statements formed the subject of the action, the plaintiff had a verdict.

We agree in his opinion, that the communication to *Brinsdon* was protected, and that the statement made upon the second meeting to *Taylor*, in the plaintiff's absence, was not: but we think upon consideration, that the statement made to the plaintiff, though in the presence of *Taylor*, falls within the class of communications ordinarily called privileged, that is, cases where the occasion of the publication affords a defence in the absence of express malice.

In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another, (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reason-

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able occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits.

Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice, is that of a former master giving a character of a discharged servant: and I am not aware that it was ever deemed essential to the protection of such a communication, that it should be made to some person interested in the inquiry *alone*, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry, (and that has been very liberally construed, *Child v. Affleck and others*, 9 B. & C. 403; *Pattison v. Jones*, 8 B. & Cr. 578,) the nature of the transaction cannot be altered by the simple fact that there has been some casual bystander.

The business of life would not be well carried on if such restraints were imposed upon this and similar communications, and if on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master *bonâ fide* to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of *necessity* take away from it the protection which the law would otherwise afford.

Where, indeed, an opportunity is sought for, of making such a charge before third persons which might have been made in private, it would afford a strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement when

made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bonâ fide* in making the charge, or been influenced by malicious motives.

In the present case, the defendant stood in such a relation with respect to the plaintiff, though not strictly that of master, as to authorize him to impute blame to him, provided it was done fairly and honestly, for any supposed misconduct in the course of his employment. And we think that the fact that the imputation was made in *Taylor's* presence does not of *itself* render the communication unwarranted and officious, but, at the most, is a circumstance to be left to the consideration of the jury.

We agree with the learned judge that the statement to *Taylor* in the plaintiff's absence was unauthorized and officious and therefore not protected, although made in the belief of its truth, if it were in point of fact false; but, inasmuch as no damages have been separately given upon this part of the charge alone, to which the fourth count is adapted, we cannot support a general verdict, if the learned judge was wrong in his opinion as to the statement to the plaintiff in *Taylor's* presence; and as we think that at all events it should have been left to the jury whether the defendant acted maliciously or no on that occasion, there must be a new trial.

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A party in a cause executed a deed-poll of release to an intended witness, who was otherwise incompetent, and handed it to his attorney to be used if it should be necessary to call the witness at the trial; it being afterwards thought advisable to release another witness, his name was inserted in the release, and the party re-executed before it had been delivered out of his attorney's possession. Held, that it was still in fieri, and might be read in evidence without a fresh stamp.

But *quære*, whether one stamp is sufficient on a release to two witnesses?

**TRESPASS.** Before the trial at the last *Surrey* assizes, it was known that *Churchill*, one of the defendant's witnesses, was incompetent till released. A deed releasing him was, without his knowledge, executed by the defendant, whose attorney retained it in his possession without delivering it to him. It being discovered, in the course of the cause, that it would be advisable also to release another witness for the defendant, named *Pizzey*, his name was inserted in the deed, the rest of which having been duly altered throughout so as to include him, was re-executed by the defendant. This alteration in the release having appeared on its production, the plaintiff objected that it had become a perfect deed by the first execution, so that a fresh deed stamp would be requisite on the re-execution after inserting *Pizzey's* name; or at least that its re-execution in an altered state avoided the first release to *Churchill*. The learned judge, Lord *Lyndhurst* C. B. having overruled the objection, the witnesses were examined and the defendant had a verdict. In *Easter* term *Platt* obtained a rule for a new trial.

*Adolphus* and *Thesiger* shewed cause. Were these witnesses duly released? The deed was so far under the controul of the obligor, after its original execution, that it might be intercepted and further operation given to it without a fresh stamp, for it was still in fieri: nor had the first stamp, to use the expression of Lord *Ellenborough* in *Webber v. Maddocks* (a), ever been "occupied." In the case cited, parties who had agreed to give the plaintiff a bill sent him a promissory note;

(a) 5 Campb. 1.

he immediately returned it to be altered into a bill according to the agreement (a); and it was held that the instrument so altered into a bill did not require a fresh stamp, as it had never been negotiated in the shape of a note; Lord *Ellenborough* saying, "It remained in the hands and under the dominion of the original parties; every thing continued in fieri till after the alteration. The stamp was not occupied till then." *Matson v. Booth* (b), was an action on a bond of indemnity to the sheriff, which had been prepared in the name of four obligors and executed by them, but being objected to by the sheriff for want of a fifth obligor, his name had been inserted and his execution obtained without a fresh stamp; and the bond was held good on the same principle. *Bayley J.* there said, "With respect to the objection upon the stamp, I am not aware of any case like the present in which it has been holden that a new stamp is necessary. If a bill be altered while still in the drawer's hands before it gets into circulation and is accepted, it has never been considered that a new stamp was requisite, otherwise if it has been accepted, for then it has become a complete bill. Now here the bond was never out of the hands of the obligor, it remained with his agent and never passed to the obligee.

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(a) *Kershaw v. Cox*, 3 Esp. N. P. C. 246, per *Le Blanc, J.* (as explained, 10 East, 434; 15 East, 417,) shews, that a correction of a mistake in a bill returned for that purpose by the indorsee, promptly made in furtherance of what was substantiated by proof to be the original intention of the parties at the time of making it, will not make a fresh stamp necessary; if, as in that case, (which as well as *Jacobs v. Hart*, 6 M. & S. 266; 2 Stark. C. N. P. 45, *S. C. Kennerley v. Nash*, 1 Stark. 452; *Stevens v. Lloyd*, M. & Malk. 292; appear to be cases of bills for value) the alteration takes place after the original drawer or payee might have sued on them, but before effectual negotiation to an indorsee. From *Downes v. Richardson*, 5 B. & Ald. 674, it would appear that an alteration in an accommodation bill would be fatal, if made after issue to any person who could make a valid claim upon it viz. to the first holder for valuable consideration.

(b) 5 M. & Sel. 223.

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As my Lord has remarked, it was in fieri, the bond was in nature of an escrow only." That case is distinctly in point. Nor is the present like the instance of a deed delivered, not as such absolutely, but as an escrow to a stranger, to be kept by him, and not to take effect as a deed till some condition is performed by the grantee. For in that case, when the condition is performed, the grantee's title to the possession of the deed having become absolute, he may demand possession of it, which in this case the witness first released could not do, the execution of the deed being merely *de bene esse*. [Lord *Lyndhurst* C. B. You may assume the fact in this case to be, that the deed was not intended to operate as a deed unless the witness was called, and not to operate if he was not called.] The delivery of the release by the obligor was not complete. [Lord *Lyndhurst* C. B. Had it been once delivered as an escrow, could any difference arise, as it must be stamped in that case?] In 1 *Sheppard's Touchstone*, 58, *Preston's* edit. distinction is drawn between the delivery of a deed to a stranger and to the party; and it is said that if a deed be delivered to a stranger without any declaration, intention or intimation, unless it be in a case where it is delivered as an escrow, it seems not a sufficient delivery; and yet if an obligation be made to the use of a third person, expressed in the deed, and the obligor deliver it to him to whose use it is made, this is said to be a good delivery. This shows that while a deed remains in the possession of the party making it, it is not considered as complete, and is consistent with the passage in *Comyns's Dig.* tit. *Fait*, (A. 3,) that "if it be delivered as his deed to a stranger to be delivered to the party on performance of a condition, it shall be his deed presently, and if the party obtains it he may sue before the condition performed." That position is

altogether denied by the court in *Johnson v. Baker* (a). Nor is the second "caution" prescribed in the *Touchstone* on delivering a deed as an escrow complied with, for instead of its being "to a stranger and to one who was no party to it," it was to the defendant's attorney, whose possession was indential with his own. In *Murray v. Earl of Stair* (b), the bond had been delivered by the obligor as his deed, but before and at the time of the execution it was agreed that it should remain in the hands of another person till a certain event took place, and it was delivered to him accordingly. It was held to be a question of fact for the jury, on the whole evidence, whether the bond was delivered as a deed to take effect from the moment of delivery, or as an escrow, not to operate as a deed till the event happened. That could not have been so held, had the execution of the bond been sufficient without more. In the learned judgment of the court in *Doe d. Garmons v. Knight* (c), *Taw v. Bury* (d) and other cases are cited as clear authorities that on a delivery to a stranger for the use and on behalf of a grantee, the deed will operate instanter, and its operation will not be postponed till it is delivered over to or accepted by the grantee; and the court held, without question, that delivery to a third person for the use of the party in whose favour a deed is made, where the grantor parts with all controul over the deed (e), makes the deed effectual from the instant of such delivery. That shews that till the grantor parts with his controul over a deed, the absolute execution of it without delivery does not make it complete, and it is still in fieri subject, to

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(a) 4 B. &amp; Ald. 442.

(b) 2 B. &amp; Cr. 82.

(c) 5 B. &amp; Cr. 671, 692.

(d) Dyer, 167 b; 1 Anders. 4.

(e) See the Lord Chancellor's expressions in *Cotton v. King*, 2 P. Wms. 358, cited in argument 5 B. & C. 684, *Doe v. Knight*.

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alteration. In *Johnson v. Baker* (a), a surety was sued on a covenant in a deed for payment by him of certain sums in full discharge of the debts of a trader; and though he had executed it in the usual way, it was held only to operate as an escrow, it having been previously stated that the deed should not operate unless all the creditors signed. In *Jones v. Jones* (b), a marriage settlement was held good without a fresh stamp, which, after execution by the only conveying party, had been altered before execution by the rest on objection by one of them, was afterwards re-executed by the conveying party (c). [Bolland B. In *Rex v. Bayley* (d), Mr. Justice Little-*dale* held, that a release by the holder of a bill to one of two joint acceptors for valuable consideration to both of them jointly, was sufficient to make them competent witnesses to prove the forgery, though on one stamp. Alderson B. In this case the release of the one witness is not a release of the other.]

*Platt* in support of the rule. The question is, whether a deed of release to *Churchill* having been delivered by the defendant with due formality, and attested by a witness, became his act and deed, perfect for all purposes, and without reference to the use which might afterwards be made of it. Under these facts the stamp had been occupied. Had it been a release of lands the estate would have passed, or suppose it to have been produced after thirty years had expired, it would prove itself as a perfect deed, and the attestation would be

(a) 4 B. & Ald. 440.

(b) *Ante*, Vol. III. 890; see 4 B. & Ald. 675, per *Bayley* J.

(c) In *Hall v. Chandless*, 4 Bing. 123, there were five parties to a lease. Three having executed, it was, by consent of one of them only, altered in a manner affecting him and not the rest. The other two then executed, and the deed was held valid. *Pigott's case*, 11 Rep. 27; *Doe d. Lewis v. Bingham*, 4 B. & Ald. 672, were cited. And see *Hudson v. Rerett*, 5 Bing. 368.

(d) 1 C. & P. 435.

evidence of its due execution. [Lord *Lyndhurst* C. B. Would its appearing to be a perfect deed preclude the opposite party from shewing that it had never been delivered out of the hands of the party releasing? It is clear that it was never intended to operate unless the persons named in it should be called as witnesses, nor could they have otherwise insisted on the benefit of it.] The deed being duly executed became operative to release *Churchill*; nor can its operation at that time be altered by any condition on which it was to be delivered. If it did not originally operate as a deed, when did it? In *Johnson v. Baker* the delivery was held to be of an escrow only, for being inter partes, and not executed by all the parties, it might well be held incomplete (a). Had it been necessary to read it as evidence, could he have done so without a stamp? [Lord *Lyndhurst* C. B. This is a mere deed poll, which the party released was ignorant of, and which remained in the possession of the attorney of the releasor. That introduces some analogy to the cases of bills. *Alderson* B. In *Matson v. Booth* (b) *Bayley* J. says the bond was in the nature of an escrow only. May it not be altered in the intermediate time?] If it were an escrow only, it could not have been read without a stamp if any question arose on it while in that state; after being stamped it could not be altered. The cases on bills and notes turn on this, that they being negotiable instruments are not considered perfect till circulated. [Gurney B. You are not driven to contend that the deed is void as to *Churchill*, if you can establish it to be so as to *Pizzey* by the previous occupation of the stamp.] In *Matson v. Booth* the bond was never perfected according to the original design, which was not to be carried into effect till all the sureties were inserted to the satisfaction of the sheriff; whereas here the

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(a) See last page, note (c).

(b) 5 M. &amp; S. 223.

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original object of releasing *Churchill* only was perfected by the execution of the deed-poll. [Lord *Lyndhurst*. In every case of this kind the question is, whether, under all the circumstances, the matter was in fieri or not up to the time of the alteration? That must be collected by the court from the nature of the transaction. In *Matson v. Booth* the addition of the fifth obligee, before the bond was used, was held not to vitiate the bond, which was considered to remain imperfect till it was absolutely executed and delivered to the obligee. In the present case the release, after being executed by the party, remained in her attorney's hands as her own, its object only being that, if necessary, it should be produced at the trial. Before it was so produced, it was found requisite to insert in it the name of another witness. And the question is, whether it did not remain in fieri till it was used, and whether these circumstances are not at least as strong as those in *Matson v. Booth*?] The inconvenience of permitting successive alterations of a deed while in the possession of the obligor or his attorney might be great. *Jones v. Jones* was inter partes, this is a deed-poll.

*Cur. adv. vult.*

LORD LYNDHURST C. B. delivered the judgment of the Court.—This was an application for a new trial, on the ground that improper evidence had been received. The question turns on this point; it had been deemed necessary that a witness should be released, and accordingly a deed was prepared and executed in the usual form, and was handed over to the attorney of the party releasing, to be given to the witness, if it should become necessary, at the trial. Previously to its being used, it occurred to the counsel that another witness might be necessary, and accordingly the deed was altered, by the insertion of the second witness's name,

and by the adaptation of the words of the deed to that insertion. Being thus altered, it was re-executed before it was delivered to the witness. It might have been a question how far the stamp would have been sufficient for a release to both the witnesses, but the objection taken at the trial was, that the stamp having become *functus officio* by the first execution, could not again be used. No doubt if the deed had in the first instance been so completely executed that the stamp was once occupied, no further use could have been made of it, and a re-execution would have required a fresh stamp. But so long as it remained in *fieri* it was not completely executed, and the stamp was not occupied. In *Matson v. Booth* (a) the bond had been executed by the plaintiff and the four sureties in the usual manner and tendered to the sheriff, but the Court observed that was in *fieri* and in the nature of an escrow only. In that case, as well as in the present, the bond was delivered in the usual form of words. In *Murray v. Earl of Stair* (b) it was held, that in order to make the delivery conditional, the conclusion was to be drawn from all the circumstances of the case. The distinction between the execution of a deed being in *fieri* or being complete, was likewise taken in *Jones v. Jones* (c). These cases are decisive with regard to the objection which was taken at the trial. The deed, though completely executed in point of form, was placed in the hands of the attorney only to be used in case it became necessary. We think that, under these circumstances, the execution of the deed in question was in *fieri* only, and that the re-execution did not make a new stamp necessary.

Whether one stamp would have been sufficient for a release to two persons may well be doubted, but that

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(a) 5 M. &amp; S. 223.

(b) 2 B. &amp; Cr. 88.

(c) *Ante*, Vol. III. 890.

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objection was not taken at the trial (a). If it had been then taken it might probably have been removed by procuring a fresh stamp. We are all of opinion that the rule must be discharged.

Rule discharged (b).

(a) See *Rex v. Bayley*, 1 C. & P. 435.

(b) See a converse case, *Waddington v. Francis*, 5 Esp. R. 182. Two stamps were held necessary where a written stamped agreement for a wager was indorsed with another agreement for doubling the bet, *Robson v. Hall*, 1 Peake's R. 128; but it was held evidence of the first agreement, that not being varied by the second, per *Holroyd J. Reel v. Deere*, 7 B. & Cr. 264. Where several were admitted to the freedom of a corporation on one stamp, the admission of the first person only was held good; see per *Ashurst J. Gilby v. Lockyer*, Doug. 216; *Rex v. Reeks*, Lord Raym. 1446.

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### SNELLING *against* Lord HUNTINGFIELD.

A. went to B. on 20 July, to treat with him for an engagement as farming bailiff. B. handed to him a paper on which the proposed terms of service were written, but it was not signed by either party. A. asked when he was to come. B. said on the 24th. A. made no objection, but took the paper away with him, and came into the service on the 24th. Held: that this was an agreement on the 20th for a service for a year from the 24th, and as the memorandum was not signed by the party to be charged, it was not valid by section 4 of the statute of frauds, 29 Car. 2. c. 3.

**A**SSUMPSIT. The declaration stated that on 24 July 1832, in consideration that the plaintiff, together with S. L., at defendant's request, would become servants of defendant, the plaintiff, as bailiff, and S. L. as housekeeper, to continue for a year at 80*l.* wages to be paid to the plaintiff, the defendant promised to employ him as such servant, and to continue him in his service for the year ensuing. Averment, "that the plaintiff entered into the service and found and provided S. L. to act for defendant as housekeeper, and paid her accordingly, yet the defendant would not continue the said plaintiff in his service till the expiration of the year." The 2d count stated, that, in consideration that the plaintiff would become servant to the defendant, and would find, provide for, and pay a person who

would act for the defendant as housekeeper, and would continue in the service of defendant for a year, at certain wages &c., the defendant promised (as before). There was a count for wages, work and labour, and materials found, goods bargained, sold and delivered, money paid, lent, had and received, and on an account stated. Pleas : first, non assumpsit, except as to 21*l.* 3*s.* 5*d.*, part of the sum claimed in the third count, and as to that a tender; secondly, a set-off for goods sold &c., upon which issue was joined. At the trial before *Gurney B.* at *Guildhall*, on 10 *June* 1833, the following facts were proved :—On 20 *July* 1832 the plaintiff went to the defendant for the purpose of making an agreement to go into his service as bailiff, and the following memorandum of the proposed terms of hiring was written by the defendant in the plaintiff's presence :—

“ The pork wanted, to be at 5*s.* per stone.

The wheat required, at 27*s.* per coomb.

The board of two servants, at 2*s.* per day.

The person and his daughter a housekeeper, to do for them and manage the dairy and some poultry. The person to have the road running through the parks as the division of the lands to be managed by each bailiff. You take the south side. The salary for the bailiff and housekeeper to be 80*l.* per year. All expenses paid going either to market or sales.” This paper was not signed by either party, but was handed to the plaintiff, who then asked when he was to come : the defendant said on the 24th : the plaintiff made no objection to this, but took the paper away with him, and came on that day. He remained in the service three months and twelve days, when the defendant gave him notice to leave at the expiration of a month from that time. On the 14 *November* the defendant ceased to give the plaintiff any orders, and wished him to leave the premises at once ; but he refused and remained till

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6 December, when the month's notice expired. The defendant paid into court 21*l.* 3*s.* 5*d.* wages for three months and twelve days from the 24 July; he had before tendered it, but the plaintiff rejected it, saying that he insisted on a year's wages; and in his bill of particulars he claimed "salary from 24 July 1832 to 24 July 1833, 80*l.*" When the plaintiff came into the service three servants were kept by him instead of two, as mentioned in the proposal. It was objected on the part of the defendant, that the contract proved was an agreement on 20 July for a year's service, to begin from the 24th; and therefore, that as it was a service which was not to be performed within the space of one year from the making of the agreement, the memorandum should have been signed by the party to be charged by the statute of frauds (a). The plaintiff contended that the agreement was not made till 24th, when by entering into the service he shewed his assent to the previous proposal, and therefore it was to be performed within the year. The learned judge said that he would reserve the point on the statute of frauds, if it should be necessary, and then left it to the jury to find, first, whether the special counts had been proved, and next, whether any thing was due for board of the servants after the 14 November, which could be recovered under the count for goods sold, or money paid. The jury found a verdict for the plaintiff, with 60*l.* damages on the special counts, and 3*l.* a balance due on the common count for board supplied by the plaintiff to the servants after the 14 November, with the assent of the defendant.

In Trinity term 1833, the Recorder (C. Law) obtained a rule to enter a nonsuit, on the ground, first, that the agreement proved was not valid by the statute of frauds, *Bracegirdle v. Heald* (b); secondly, that the contract proved varied from that set out in the declaration; and thirdly, that the evidence did not support the third

(a) 29 Car. 2. c. 3. s. 4.

(b) 1 B. & A. 722.

count. No question arose on the tender or the payment of money into court.

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*Bompas* Serjt. and *Platt* showed cause. The only question is, whether there was evidence to infer a contract entered into on the 24 *July* for service for twelve months, to begin from that day, as stated in the declaration. *Bracegirdle v. Heald* does not apply, because that was an action for not receiving the party into the defendant's service, and therefore rested on a supposition that the contract existed before the service began. So in *Boydell v. Drummond* (a), the agreement was for the delivery of a future publication, which by the terms of the contract could not be complete within the year. But in this case no contract existed till the plaintiff had assented to it by entering the service. The written document which was delivered on the 20th, was merely a proposal of the terms on which the defendant would take the plaintiff into his service; it was not obligatory till the plaintiff had assented to it, and he did not give his assent to it till he went into the service on 24 *July*. An agreement, to be within the statute of frauds should be available at the time; but in order to be binding, it must be mutual, and when the paper was handed to the plaintiff he was not obliged to enter into the service, as he had done nothing to adopt the terms at that time. [Lord *Lyndhurst* C. B. What contract was made between the parties except that? The defendant, when they met on the 20 *July*, wrote down the heads of the terms, which the plaintiff had an opportunity of seeing: he then said, "you will come on the 24th; the plaintiff went away apparently assenting, took the paper with him, and did come again on the 24th. Is not this an assent? It is very strong evidence for a jury that at that time he agreed to come on the 24th, and serve on the terms contained

(a) 11 East, 142: 2 Camp. 157. S. C.

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in the papers. Then his coming on the 24th explains his previous want of assent. *Alderson B.* If the plaintiff went into the service without a contract, how can he support the statement in the special counts? He did not promise on the 20th to return on the 24th, and the terms on which the service was executed were different from those that were first proposed, for instead of two, three servants were kept by the plaintiff. [Lord *Lyndhurst C.B.* The employment of another servant does not vary the terms of the agreement, and in all other respects the service corresponds with it, though the additional servant entitled him to extra payment on that account.] But suppose the contract absolutely void, then the fact of one party going into the service and the other receiving him, is evidence of a contract then made, which the law would presume to be for a year. *Co. Litt. 42 b. Beeston v. Collyer (a), Rex v. Worfield (b).* [*Alderson B.* Will the law presume a contract corresponding with that set out in the declaration? In cases on the poor laws a contract for a year may be inferred from the fact of the party going into the service; but such a contract as is stated in the declaration cannot be implied from the same circumstances.] The jury found that the plaintiff had been paid his wages pro rata during the time he remained in the service; and from such payment a new contract will be presumed to have commenced on the 24th, which was regulated by the terms contained in the proposal: as where a party holds premises under a lease not valid by the statute of frauds, the court will admit evidence of the terms of that agreement to regulate the tenancy; *Doe d. Rigge v. Bell (c)*. So a void bond has been referred to in order to ascertain the terms of hiring when an action of assumpsit has been brought

(a) 4 Bing. 309; see per *Gaselee J.* id. 313.

(b) 5 T. R. 506; and see as to hiring a bailiff, *The Earl of Mansfield v. Scott*, 1 Clark & F. Rep. Dom. Proc. 319.

(c) 6 T. R. 176.

for services performed; *White v. Cuyler* (a). [Lord *Lyndhurst* C. B. If there is evidence of a contract and a service agreeably to the terms of it, why should we imply another? The party cannot reject that, because it is not valid in point of law.] What took place before-hand was part of the evidence of a contract, and not the contract itself. All domestic servants are hired in the same way a few days before they come into the service, but the contract does not take effect till the day on which the service begins. As for the verdict on the third count, there is evidence of board furnished, which will support a count for goods sold; for it is impossible for a person to board servants for the defendant without laying out money and supplying goods for his use. In *Brown v. Hodgson* (b) *Mansfield* C. J. says, "If a man pays money for another not officiously and without reason, he may support the action for money paid."

*C. Law* and *Chilton* in support of the rule were stopped by the court.

LORD LYNTHURST C. B.—If a party does not prove a contract, the court may infer one corresponding with the acts of service; but we need not here presume another contract, when the plaintiff has relied upon one which differs only in one particular from the service which was performed. Here is a contract in fact (c), to which all the acts of the parties are referable. The question is not whether the plaintiff is entitled to compensation for services performed, but whether he is entitled to damages for a breach of contract by the defendant in not employing him in his service to the end of the year. (d) My opinion is, that the contract was entered into on the 20th, four days before the 24th.

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(a) 5 T. R. 471.

(b) 4 Taunt. 190.

(c) See *Williams v. Jones*, 5 B. & C. 108.(d) See *Mavor v. Payne*, 3 Bing. 285.

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As there was no memorandum in writing signed by the parties, there is no evidence, as required by the statute of frauds, to support the special counts. Upon these, therefore, the defendant should have a rule for a non-suit. Upon the common count the plaintiff is entitled to *3l*.

At the suggestion of the Court the defendant consented to pay that sum to the plaintiff, and undertook not to call on him for costs unless he bring a fresh action. Subject to those terms, Rule absolute (a).

(a) *Hulle v. Heightman*, 2 East, 145; *Eardley v. Price*, 2 N. R. 333. not cited in *Collins v. Price*, 5 Bing. 132. *Gandall v. Pontigny*, 1 Stark. C. N. P. 198; 4 Camp. 375, S. C. seems contrary to the principal case.

### REEVE *against* BIRD.

A. let premises, consisting of a stable and cottages, to B. for seven years. B., before the expiration of the term, assigned the premises to C. and paid his rent up to that day, which was in the middle of a half year. C. occupied part of the premises, and on leaving them, not at the end of a half year,

paid rent for the time to A.'s agent. A. was not at that time aware either of the assignment or the occupation by C. Afterwards, but still before the expiration of the term, A.'s agent advertised the premises to be sold, and no sale taking place, let two of the cottages to fresh tenants, in order, as he said, to relieve some tenants who had run away. The agent afterwards received portions of the entire rent from the tenants, and the rest from C. the assignee of B. Held, that these facts, taken collectively, amount to a surrender of the term by operation of law.

*Semble*, When a number of facts, which singly may be ambiguous, amount collectively to an unequivocal proof of a fact, e. g. the surrender of a term, a judge is not bound to submit them formally to a jury, unless the counsel expressly desires it.

**A**SSUMPSIT on a special agreement of demise, by which the tenant was bound to keep and leave the premises in repair, and to leave all improvements. Breach, that the defendant did not, during the tenancy, keep the premises in good repair, nor so leave the same with all the improvements. There were the common counts for use and occupation, money paid, and on an account stated. Plea: Non-assumpsit. At the trial before *Denman* C. J. at the last assizes for the county of *Cambridge*, it appeared that the plaintiff being possessed of certain premises, consisting of stables and three or four cottages in the town of *Cambridge*, and being resident at a great distance,

agreed with the defendant, by an instrument dated 17 *June* 1826, not under seal, but signed by both parties, to let them to him for a term of seven years, beginning on the 25 *June* 1826, at the annual rent of 90*l.* payable half yearly at *Midsummer* and *Christmas* on the terms mentioned in the declaration. The term would have expired at *Midsummer* 1833. From 1826 to 1832 the defendant continued to hold the premises, occupying the stables as an innkeeper, and letting the cottages to different under-tenants. In *January* 1832 the defendant having become embarrassed, agreed to assign all his effects for the benefit of his creditors, and though no actual assignment was executed, Mr. *Bullock* took upon himself the character of trustee. By an agreement of 5 *January* 1832, the defendant assigned to *Bullock* all his interest in the premises, and all the arrears of rent from *Bird* up to that day were paid to *Harris*. *Bullock* took possession of the stables on 2 *April*, paid rent to *Harris*, the then agent of the plaintiff, and after an occupation of four months let them to *Ekin*, who left them at the end of *June* 1832, and sent the key to *Bullock*. *Harris* did not know on 2 *April*, nor till a month afterwards, that *Bullock* was in possession of the premises. In *January* 1833 *Harris* received of *Bullock* 36*l.* 10*s.* as the balance of half a year's rent due on the entire premises, having before received portions of the rent from the other tenants, for which he gave receipts in the following forms :—

Received, *December* 1832, of Mrs. *Pledger*, three pounds ten shillings, for half a year's rent due *Midsummer*, for Mr. *Reeve's* house in *King Street*.

£3 : 10*s.*

Chas. P. Harris.

Received, 15 *January* 1833, of Mrs. *Pledger*, the sum of three pounds ten shillings, being half a year's rent of premises in *King Street*, held of Mr. *Reeve*, due *Christmas* last.

£3 : 10*s.*

Chas. P. Harris.

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Received, 23 *January* 1833, of Mr. *Prince*, the sum of nineteen pounds sixteen shillings and eight pence, being one year's rent of premises in *King Street*, held of Mr. *John Reeve*, due *Christmas* last, (less three shillings and four pence, gaol rate.)

*Chas. P. Harris.*

On 11 *August* 1832 *Harris*, by direction of the plaintiff, advertised the premises for sale; they were not sold, but he afterwards let one of the cottages to Mrs. *Allen*, and in *February* 1833 again let one to *Susan Dealty*. *Harris* said that he did not see the defendant all this time, but that some of the tenants had run away, and he let the premises to save the parties. There was no evidence that the premises were out of repair when the defendant left them. The learned judge thought that it was difficult to say that no surrender had been made, and said that there was nothing for the jury except the state of repair at the end of the term. The jury on this found a verdict for 5*l.* as a fair sum to put the premises in repair at the end of the seven years, and the plaintiff was then nonsuited, with leave reserved to move to enter a verdict for 76*l.* 8*s.* the balance of rent due to *Michaelmas* 1833, and 5*l.* the amount of repairs.

A rule for a new trial was obtained in *Easter* term, on the ground that the learned judge had refused to submit to the jury the facts from which a surrender of the term was inferred, and that a jury should decide whether there was not an eviction of part of the premises only, and then the defendant would be liable on the quantum meruit, if his interest in the remainder continued; *Stokes v. Cooper* (a).

[*Parke* B. It does not seem noticed in that *nisi prius* case that it is the landlord's own act if he evicts

(a) 3 Camp. 514.

the tenant from part of that for which he has an entire rent : but the true point here is, whether there was not abundant evidence to show that the plaintiff, with the defendant's assent, let to other persons].

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BIED.

*Biggs Andrews* now showed cause. The term was surrendered by operation of law, by the assignment of the premises to the trustee whom *Reeve* afterwards recognized ; therefore no rent is due from the defendant since that time, and the evidence shows that all rent due before had been paid. The original landlord gave up his claim on the defendant, because when he quitted possession in the middle of the half year he paid 27*l.* due at that time : since which he has received the rent from his assignee, *Bullock* ; *Thomas v. Cook* (a). Again, the sale by *Harris*, advertised in August 1832, though the term would not have expired till the next year, is evidence of an eviction. This is not an equivocal act, as endeavouring to let the premises by putting up a bill in the window, as in *Redpath v. Roberts* (b), which might have been for the tenant's benefit ; but here some of the premises were actually let to Mrs. *Allen*, and afterwards another cottage to *S. Dealty*. This eviction of part amounts to an eviction of the whole, *Dalston v. Reeve* (c), *Smith v. Raleigh* (d).]

*Kelly* and *Palmer* in support of the rule. At the trial the chief justice said there was nothing for the jury except the state of repairs at the end of the term. There is no fact upon which the presumption of a surrender can arise, except the letting of the cottage to Mrs. *Allen*. If there was a surrender, when did it take place ? not on 5 *January*, because there can be no

(a) 2 B. & A. 119 ; 2 Stark. 408, S. C. ; *Phipps v. Sculthorpe*, 1 B. & Ald. 50, S. P.

(b) 3 Esp. 225. (c) 1 Ld. Raymond, 77. (d) 3 Camp. 513.

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valid surrender except by consent of the parties, and *Reeve* was not then aware of the change of the tenants; neither did the receipt of rent by *Harris* from *Bullock*, in the following *April*, amount to a surrender of the term, because he treated him as the trustee of *Bird*, paying rent on his behalf, and did not intend to accept him as a new tenant (a); but even if *Harris* had accepted a new tenant, it would not have affected the plaintiff, because it would have been beyond the scope of *Harris's* authority as agent, which was to collect the rents only, and not to accept surrenders or make alterations in the tenancy. The demise of the cottage to *Dealty* was not an eviction, because *Harris* said that he put the persons in, not in order to resume possession for the landlord, but to save some of the tenants who had run away; and an underletting under such circumstances is not equivalent to an eviction by the landlord. [*Parke B.* Is it not abundant evidence of the plaintiff having, with the consent of the defendant, let to another tenant? if so, this is within the case of *Thomas v. Cook*]. But at any rate the eviction of one cottage does not amount to a surrender of the whole. There may be "an apportionment of the rent in respect of that part of the land leased which is evicted," *Clun's case* (b). [*Parke B.* It is said in *Co. Litt.* 148 b. that if a lessor enter upon the lessee for life or years into part, and thereof disseise or put out the lessee, the rent is suspended in the whole, and shall not be apportioned; and in *Walker's case* (c) it is said that if a man leases three acres, rendering rent, and the lessor ousts the lessee of one acre, he

(a) See *Matthews v. Savell*, 8 Taunt. 270.

(b) 10 Co. 128.

(c) 3 Co. Rep. 22 b. But it is added, "if the lessor recovers part in an action of waste, &c., or by surrender, &c., the rent reserved upon a lease for years, which is a rent service, shall be apportioned; and this is to be intended of a lawful entry, as for a forfeiture or by surrender, and not of a tortious entry." *Ib.*

shall have an action of debt for no part." If the landlord evict, he must take the consequence of his own act]. Then the facts ought to have been left to the jury, but the judge said there was nothing for them. [Parke B. Should not the judge be distinctly asked to submit the facts to a jury, if they appear ambiguous? But it is quite clear in this case what would have been the finding of the jury. Alderson B. The landlord here gets rid of an insolvent tenant, and the jury would on slight evidence readily presume that he wished to do this, and had accepted a new tenant.]

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PARKE B. had left the court to attend chambers.

BOLLAND B. was absent this day from indisposition.

ALDERSON B.—The rule must be discharged. Whether the facts proved were or were not evidence of a surrender, was properly a question for the jury. If it had been distinctly put to the judge that the question was for the jury, and he had been requested to state it to them in such and such specific terms, but he had thought it a mere question of law, and that there was nothing for the jury, I should have been of opinion that there should have been a new trial: but his expression that there was nothing for the jury, must be taken to mean that there was nothing of doubt for them to consider. The evidence desired to be left to the jury should have been distinctly put to the judge, in order that it might have been disposed of by them at the time. But is there any thing in substance upon which the jury could reasonably entertain a doubt, had it been submitted to them? Though, taking the circumstances separately, no one might have proved the fact, if they are taken all together there is sufficient to presume a surrender of the term by operation of law.

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BRAD.

First, there is a payment of rent to the 5 *January* 1832, and then to the middle of the next half year, by *Bullock*, of rent which would not have been due till the *Midsummer* following; secondly, the advertising the premises for sale, and alternately letting some parts of them to new tenants; and lastly, the receipt of rent from the rest of the old under-tenants by the plaintiff's agent. The question being, whether before the premises were out of repair the landlord had accepted another tenant, so as to effect a surrender "by act and operation of law," I am of opinion that the landlord, by his conduct during the term, has accepted other persons as his tenants, and by so doing has released the defendant. The expression of the chief justice, that there was no question for the jury, therefore meant, that there was no question upon which the jury could entertain a reasonable doubt.

GURNEY B. concurred.

Rule discharged. (a)

(a) A parol assignment of a lease from year to year is void by 29 C. 2. c. 3. s. 3.; *Botting v. Martin*, 1 Camp. 318, cited 2 B. M. 270. So a tenancy from year to year is not in general determined by a parol licence from the landlord to the tenant to quit in the middle of a quarter, *Mollett v. Brayne*, 2 Camp. 103, unless the landlord takes possession to the exclusion of the tenant before a new year has begun, which it appears from *Manning's Digest of Nisi Prius Reports*, 151, 2d edit., that he did not in *Mollett v. Brayne*; and see *Thomson v. Wilson*, 2 Stark. C. N. P. 379; *Dee v. Ridout*, 5 Taunt. 519, 3 P. But his putting up a bill in the window, endeavouring to procure another tenant, *Redpath v. Roberts*, 3 Esp. C. N. P. 225, or lighting a fire and roasting a hare in the deserted apartments, *Griffith v. Hodges*, 1 C. & P. 419, are not such "acts" of "entering and using the premises," to use the words of *Abbott C. J.* in the last case, as will deprive him of his claim to rent for the year. Nor can a surrender by "act and operation of law" take place under 29 C. 2. c. 3. except there be a written demise to a new tenant, or he takes possession, *Taylor v. Chapman*, Peake's Addl. Cas. 19. Merely taking rent from a new occupier seems not sufficient, though

receipts are given to him with his co-occupier, the original tenant, *Graham v. Whitehead and Hull*, ante, Vol. III. 301. So, where the landlord, after giving an invalid notice to quit, put up the premises to be relet by auction, and relet them, but the old tenant having been outbid at the auction, refused to quit, so that the new tenant was not let into possession; *Doi d. Huddleston v. Johnston*, *Maclelland & Younge's R.* 141; *S. P. Huddleston v. Johnston*, 4 B. & Cr. 922. And see *Braunley v. Wade*, *Maclelland's R.* 664; *Hamerton v. Stead*, 3 B. & Cr. 478; *Peter v. Kendall*, 6 B. & Cr. 703.

But where possession is taken by the landlord, by accepting the key from the tenant, who removes with his goods in the middle of a quarter, *Whitehead v. Clifford*, 5 Taunt. 518; *Grimman v. Legge*, 8 B. & Cr. 324; and see *Brown v. Bartinshaw*, 7 D. & R. 603; or by entering premises left vacant and reletting them to another tenant who takes possession, *Wells v. Atcheson*, 3 Bing. 462; or accepting another tenant then in possession and receiving rent from him, though obtained by distress, *Thomas v. Cook*, 2 Stark. C. N. P. 408; 2 B. & Ald. 119, S. C. 408, cited *supra*, and *Phipps v. Southcote*, 1 B. & Ald. 50, S. P. (which seem to overrule *Stone v. Whiting*, 2 Stark. C. N. P. 235,) it will be a valid surrender of the original tenant's interest by act and operation of law. See also *Matthews v. Sewell*, 8 Taunt. 270. However, the express consent of all parties to the change of tenancy appears also necessary; see the above cases,

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DOE d. ELLERBROCK and Others against FLYNN.

EJECTMENT for a messuage and premises, No. 42, Cow Cross Street, Middlesex. The demises were laid on 1st October 1832; the first by *Ellerbrock*, the second by *James Phillips* and wife, the third by *James Phillips* only. By the consent rule, the defendant defended as landlord, and the trial took place before *Gurney B.*, at the sittings after last Michaelmas term.

The case for the lessors of the plaintiff was, that twenty years ago *Cropley* was possessed of the premises as assignee of a mortgage for years by *Ellerbrock* should hold *bonâ fide* under the lease: Held, that the term was forfeited by the act of betraying possession.

A termor, after deserting the demised premises, delivered up the possession of them, with the lease, to a party who claimed by a title adverse to that of the landlord, with intent to assist him in setting up that title, and not that he

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brock, and had built a house at the back of them ; that he devised to *Broad* in trust, and died possessed in 1830, leaving *Jane Phillips* his sister and heir at law. The defendant proved a lease, dated 25th *March* 1831, by which *Broad*, described as sole executor of *Cropley*, agreed to let to *Townsend*, and *Townsend* agreed to take the premises described as late in the occupation of *Cropley*, for five years, from the 25th of *March* 1831, if the estate and interest of the said *Broad* therein should so long continue, at 30*l.* a year, payable quarterly. *Broad* died in *June* 1831. *John Phillips*, the husband of *Jane*, recognized an occupation by *Townsend*, by applying to him for the rent due under this lease, on 25th *March* 1832. The lessors of the plaintiff, in reply, proved by *Townsend* that he having only paid a quarter's rent, and being afraid of a distress, deserted and locked up the premises. After he had left, *Flynn* called on him to give them up to him, claiming them as his own property under an old title. *Townsend* said he was pressed for rent by the landlord. *Flynn* said he would bail him, and *Townsend*, in *June* 1832, gave him up actual possession on receiving 5*s.* They also proved an affidavit of *Flynn*, made in an interlocutory proceeding in the cause, stating that he claimed this property adversely to the lessors of the plaintiff. Upon this evidence it was contended, that as the defendant defended as landlord, he could not set up the outstanding term in *Townsend*, who, under the circumstances, had so betrayed his landlord's title by giving up possession to *Flynn*, as to have thereby forfeited his lease. The learned baron having reserved this point, left it to the jury to say whether *Townsend* had given up the possession to *Flynn* *bonâ fide*, in order that the latter might hold under the agreement, in which case they would find for the defendant ; whereas, if they thought that he had deli-

vered up possession to *Flynn* in fraud of the landlord, and with a view to defeat his title by enabling *Flynn* to set up an adverse and better title in himself, their verdict should be for the lessors of the plaintiff. The jury found that the possession was delivered up to *Flynn* by *Townsend* in fraud of the landlord, and gave a verdict for lessors of the plaintiff.

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Platt having obtained a rule pursuant to the leave reserved at the trial,

Cresswell and *Crompton* now showed cause. The question is, whether the lease to *Townsend* was subsisting at the time of the demise laid, or had been forfeited by his act in delivering up possession to *Flynn*, in order the better to enable him to set up a title in himself adverse to that of the landlord. First, *Flynn* having come in under *Townsend*, is bound by his acts; and if *Townsend* could not insist on the existence of this lease, *Flynn* could not. Now in Bacon's Abridgment, tit. Leases (T 2) (a) it is said, that "any act of the lessee by which he disaffirms or impugns the title of his lessor, occasions a forfeiture of his lease. For to every lease the law tacitly annexes a condition, that if the lessee do any thing that may affect the interest of his lessor, the lease shall be void, and the lessor may re-enter. Besides, every such act necessarily determines the relation of landlord and tenant, since to claim under another and at the same time to controvert his title, to affect to hold under him and at the same time to destroy that interest out of which that lease arises, would be the most palpable inconsistency." That passage is fully borne out by Lord *Redesdale*'s judgment in *Hovenden v. Lord Annesley* (b), where it is said the act of a tenant in betraying the possession of his

(a) Vol. iv. 219, 6 edit.

(b) 2 Schoale & Lefroy, 624, 625.

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lessor by consenting to admit the title of another, and thus disavowing the tenure, is treated as working a forfeiture of the term, and entitling the lessor to punish it by proceeding to eject him, notwithstanding his lease. So, if a tenant for years make a feoffment with livery in order to gain the freehold, it is a forfeiture of the term, even though he should have first assigned his term to a trustee with a view to protect against forfeiture and attend the inheritance; *Lord Dormer's* ejectment^(a). Now the effect of the verdict in this case is, that *Townsend* relinquished possession in favour of *Flynn*, to enable him to set up his title in opposition to that of the landlord. [Lord *Lyndhurst* C. B. assented, adding, that it was a conspiracy between *Townsend* and *Flynn*, in which the acts of the one were the acts of the other.] Then it was not necessary that *Townsend's* term should be surrendered in writing under §9 C. 3. c. 3. s. 3., for by betraying the possession he had so disclaimed his landlord's title, that his term, and with it his rights as a tenant, were gone; so that the question was one of forfeiture or not, and not of surrender under the statute of frauds. For the same reason of disclaimer, a notice to quit would have been unnecessary, had *Townsend* been tenant from year to year; a doctrine laid down in *Throgmorton v. Whelpdale* ^(b), and recognised in *Doe d. Williams v. Pasquall* ^(c), *Doe d. Grubb v. Grubb* ^(d), *Doe d. Cateert v. Frowd* ^(e). That is, because he would be a tenant for years ^(f), and fealty is as incident to his tenure as to that of a tenant for life. Older cases show that if a tenant for years claims a larger interest than he has, *e. g.* the freehold,

(a) 3 B. & C. 399, n.

(b) Buller's N. P. 96; B. R. Hil. 9 G. 3.

(c) 1 Peake C. N. P. 259. .

(d) 10 B. & C. 816.

(e) 4 Bing. 557.

(f) Dyer, 209 a. pl. 21; and see Co. Litt. 251 a, 252 b.

that forfeits the interest he has, viz. his term; *Saunders v. Freeman* (a). *Townsend's* act was inconsistent with his duty as a tenant; therefore, whether he attorned to another, or betrayed the possession absolutely, he equally forfeited his term. The rule of law on that subject is founded on feudal principles; according to which, every act tending to the lord's disinherison, or even to alter the evidence of his title, as in the instance of waste, was held to work a forfeiture. Thus it is said in *Wright's Tenures* (b), "Estates for life, besides that they are forfeitable by attainder and cesser, are likewise, agreeably to the law of feuds, forfeited by waste; and by all such acts as in the eye of the law tend to divest or defeat the reversion or remainder, or in any manner to pluck the seigniority out of the lord's hands;" for which *Glanvil*, lib. 9, cap. 1, p. 686, and *Bracton*, lib. 2, cap. 35, sect. 11, are cited. The same law prevails in copyhold; for if a copyholder swears in court that he is not the lord's copyholder, this is a forfeiture ipso facto (c). Relinquishing the possession into the hands of *Flynn*, under the circumstances found, was a stronger act of disclaimer than attorning to him by matter of record (d).

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Platt contra. The term subsisted in *Townsend* at the time of the demise laid, unexpired and unforfeited. No act had been done by him to revest the demised premises in his lessor, unless his term was indeed forfeited. It may be admitted that any thing will amount to a disclaimer which shows assumption by the tenant of any estate above what the lord conferred on him in derogation of the title of the latter. But that was not

(a) Litt. 367.

(b) 392, 4th ed.

(c) Coke's Complete Copyholder, printed in his Law Tracts, 132.

(d) See Co. Litt. 333.

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so here; for *Townsend* had the residue of his five years unexpired, and might admit any person into possession during that period. By admitting *Flynn* he had only exercised that right, and at the same time gave his landlord the advantage of an additional security for his rent by distraining the goods of *Flynn*. A forfeiture cannot be worked by any act of disclaimer short of a precise and unequivocal act, by which he claims a larger interest than the landlord granted to him. [Lord *Lyndhurst* C. B. *Townsend* here delivered the possession, not to the hands of another merely, but to a party claiming by title paramount to that of the landlord, whom it therefore laid under fresh difficulties, by compelling him to make out his own title as lessor of the plaintiff in an ejectment.] A tenant's intention to cheat his landlord is no forfeiture, for an assignee of a lessor may assign to a beggar to relieve himself from responsibility; *Taylor v. Shum* (a). *Townsend's* animus in delivering up possession is therefore immaterial, if he had a right to do it. Besides, there was no act of the lessor of the plaintiff to show that he intended to act on this lease as a forfeiture; for no entry or claim to the possession was made.

Lord *LYNDHURST* C. B.—The action being to recover the possession of demised premises, the defendant sets up this lease. The lessors of the plaintiff insist that it is forfeited; then why should they have entered? service of the ejectment was sufficient demand of possession (b).

On the main point, I think that the jury came to the

(a) 1 Bos. & P. 21; and see cases collected in notes to *Wolveridge v. Steward*, ante, Vol. III. 640.

(b) See Adams on Ejectment, 2 ed. 141. The possession of *Townsend*, the lessee for years, being the possession of the heir, 1 Inst. 15 a; 3 Wils. R. 521; 7 T. R. 390; 8 T. R. 213.

right conclusion upon these facts. The act of the tenant in setting up a title adverse to that of his landlord, in order to obtain the freehold, operates as a forfeiture of his term; and it appears to me to be the same, whether he does so himself, or assists another to do it. Whether he tries to get the freehold himself, or by collusion or connivance assists that result in favour of another, it operates equally as a forfeiture. In this case the object of the transaction appears to have been to give, or to try to give, an advantage to *Flynn*, in asserting and establishing his alleged title.

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BOLLAND B. concurred.

ALDERSON B.—Had the lease been a freehold lease, entry would have been requisite before bringing an ejectment for a forfeiture (a).

GURNEY B. concurred.

Rule discharged.

(a) Co. Lit. 218. See *Chomley's case*, 2 Rep. 53 a.

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JESSE, Administrator of JESSE, deceased, *against* ROY and Another, Executors of SMITH.

A seaman entered into articles to serve on board the ship *Royalist* "bound from the port of *London* to the *South Seas* to procure a cargo of sperm oil; and to return therewith to the port of *London*, where the voyage was to end." Instead of wages he was to receive a certain share of the net proceeds of the cargo; and it was stipulated that no one of the crew should "demand or be entitled to his share of the net proceeds of the said cargo, until the arrival of the said ship or vessel at *London*, and her cargo should be there sold and delivered and the money for the same actually received by the owner."

A cargo was procured, the ship was afterwards condemned in a foreign port, and the mariner accompanied part of the cargo on its homeward voyage, (it having been transhipped into another vessel the *Alexander*,) but died at sea:—Held, that until in the above articles, is a word of limitation of the mariner's right to wages, and not of postponement of payment of them merely: and consequently, that as the ship did not return to *London*, the administrator of the mariner was not entitled to recover his ninety-fifth share of the net proceeds of the *Royalist's* cargo, but only to recover on a quantum meruit for his services on board the *Alexander*.

DEBT by the administrator of a seaman, against the executors of the owner of a vessel, to recover the intestate's one ninety-fifth share of a cargo of sperm oil. The action was brought on articles of agreement between *W. Smith*, the owner of the ship *Royalist*, of the one part, and the master, officers, and crew of the said ship, bound from the port of *London* to the *South Seas* to procure a cargo of sperm oil &c. and other produce of the said seas, under the command of *Thomas Hains*, and to "return therewith to the port of *London* where the said intended voyage is to end," of the other part. The first article stated, that in consideration of a certain share "of the net and clear proceeds of the cargo which shall or may be procured and brought in the said ship to *London*, they, the master &c., promised &c. to conduct her with proper care to the said port of *London*, where the said intended voyage is to end. Secondly, That no one of the crew shall absent himself from the said ship, &c. Thirdly, That the crew &c. of the said ship shall stand by the said ship in all ports and places, seas and dangers, and shall and will at all times use and exert their utmost skill and ability for the preservation of the said ship &c. and cargo, until she shall have arrived back at the port of *London* and her cargo shall be there wholly discharged. Fourthly, That no one of the crew shall neglect his duty &c. nor go out of the said ship. Fifthly,

That every lawful command which the master of the said ship shall issue for the government of the said ship &c. shall be attended to. Sixthly, That no one of the said officers and crew shall demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel at *London*, and her cargo shall be there sold and delivered, and the money for the same actually received by the owner, nor unless he shall have well and truly performed the above-mentioned voyage, according to the true intent and meaning of these articles. Seventhly, That in ascertaining the net proceeds of the said cargo *upon the completion* of the said voyage, certain charges (therein specified) shall be deducted by the owner. Eighthly, That every one of the crew who shall not return in the said ship with his cargo (except in the case of death), or who shall desert, or enter into his majesty's service, without the consent of the commanding officer of the said ship, the *Royalist*, for the time being &c., who shall plunder &c. any thing belonging to the said ship, or the owner &c. thereof, shall thereby forfeit the whole of his share of the said cargo &c. and all benefit from the said voyage. Ninthly, That the owner may sell the said cargo, or any part thereof, at any time, and for any price and upon such terms as he shall think fit, and either upon credit or otherwise, and either before or after the arrival of the said ship in the port of *London*. Tenthly, Owners may deduct from the shares any debt. Eleventhly, In case of the death of any of the crew, the executors &c. are not to be entitled to more than the deceased's share of the net proceeds of such part of such cargo as shall have been obtained while the deceased party was personally serving on board the said ship or vessel. Twelfthly, That no person should have a claim for any wages, save his share of the net proceeds of the said cargo to accrue to him under these articles. The intestate left the port

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of *London* in the ship *Royalist* in *June* 1829, on a whaling adventure to the *South Sea*, and there the ship completed her cargo of 148 tons. On her voyage homewards, after having, in consequence of disasters, been compelled to put into several intermediate ports, she was repaired at *Manilla*, and the captain was obliged to sell 22 tons, part of her cargo, to pay for her repairs. She was afterwards so much damaged at sea that she was carried into a foreign port in the *Isle of Timor* and condemned, and the remainder of her cargo was transferred to two vessels in order to be brought to *London*. The intestate, who was cooper's mate, performed all the articles to the satisfaction of the captain, assisted in transhipping 91 tons, part of the cargo, to the *Alexander*, and went on board that ship with that part of the cargo on his voyage to *England*, but died at sea in *November* 1832, a short time before she arrived in *London*.

Comyn for the plaintiff. In this case there are three points for the consideration of the court: First, Would the plaintiff be entitled to recover generally one ninety-fifth lay share of the cargo. Secondly, Is the restrictive clause in the articles a condition precedent, or only a clause for postponing the payment of the wages. Thirdly, If the plaintiff is entitled to recover generally, is his lay share of the proceeds subject to contribution for freight for bringing home that cargo. As to the first point, the crew are entitled to their lay share, as the cargo, except such part as was sold, has arrived in port, although the ship has not. The sailors look to the cargo for their remuneration for the voyage, not to the ship and stores, which are under the control of the captain, who represents the owner: else, if the sailors' earnings depended on the return of the ship, either the owner or the captain, by choosing to change the ship, might deprive the crew of

their wages, if they depended on the return of the ship. [Lord *Lyndhurst* C. B. The captain cannot, by any act of his own, deprive a sailor of the benefit of his contract; as for instance, if he discharges him improperly on the voyage, he is entitled to his full wages. So, if he sells the ship over which he has control.] Where a master hires another ship, into which the cargo is shipped and so brought home, he is entitled to freight, and the sailor to wages as if the voyage was completed in the first. [Lord *Lyndhurst* C. B. If a vessel is lost on a middle voyage, and there is a contract for wages for the whole voyage, the seaman loses his wages, with one or two exceptions; as when part of the vessel is saved, he has a lien on that part which he has contributed to save, not for salvage but for wages.] Freight is earned if the cargo arrives, though it may not complete the voyage in the same vessel. *Lyde v. Luke* (a) and *Cooke v. Jennings* (b) show that in the absence of an express contract they would be entitled. [Lord *Lyndhurst* C. B. If a vessel is lost and the cargo saved and put in another vessel, the owner is entitled to freight, but are the seamen entitled to wages?] If they follow the cargo, and freight is earned by their exertion, they are: the owner has had the benefit of their labour, and the risk is greater to the sailor; for though the owner can insure his freight, the seamen cannot insure their wages. *Webster v. De Tastet* (c). [Lord *Lyndhurst* C. B. That argument would equally apply to the case of a total loss where the seaman loses his wages, though the owner, if he chooses to insure, suffers no loss, as he may come upon the underwriters. Here the owner receives the cargo and the seaman has received no wages: there the owner receives the value of the cargo, and pays no wages.] In the case of a total loss, the seaman has not

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(a) 2 Burr. 882; 1 Bl. R. 190. S. C.

(b) 7 T. R. 381.

(c) 7 T. R. 157.

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earned his wages; that is not so here, where the cargo has been brought home. And if wages would be due generally, as it is stipulated by the last clause in the articles, that the crew are to be paid, not by wages, but by lay shares, the plaintiff must be remunerated in the way provided for by the articles as to the second point.

The defendants rely on the sixth clause of the articles, "That no one of the officers and crew shall demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the ship or vessel at London, and her cargo shall be there sold and delivered, and the money for the same actually received by the owner &c." But the whole articles must be looked to for the true construction of that clause, which will depend on the nature of the adventure, the object of the voyage, and the peculiar contingencies that must have been in the contemplation of the parties. "The words of a condition shall be liberally expounded to serve the intent of the parties;" *Com. Dig., Condition (E.)*, and "it is sufficient if the substance of the condition be performed;" *ib. (G. 14)(a)*. The object of the voyage was to obtain sperm oil, and the substance of the agreement is, that the cargo should be delivered in London, not that it should arrive in any particular ship there. [*Belland B.* The plaintiff then reads "ship or vessel" in the sixth clause, as if written "cargo" in the articles.] The articles contemplate in other parts the contingencies of the voyage, and it would be monstrous that the condition should be interpreted to mean that at all events the ship should arrive. The

(a) There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent: for the same words have been construed to operate as either the one or the other, according to the nature of the transaction. The question must depend on the nature of the contract, and the acts to be performed by the contracting parties; *Maskell v. East India Company*, 1 T. R. 643.

intent of the parties gives the rule of construction, as in *Beales v. Thompson* (a), where the mariner stipulated in the articles that he would "not be on shore under any pretence without leave before the voyage was ended," but was detained on shore six months by the hostile act of a foreign government in the nature of an embargo; and Lord *Ellenborough* said, "It is material to observe that the being on shore here meant is, by reference made in the articles to the statute 2 *Geo. 2. c. 36.*, and 37 *Geo. 3. c. 78.*, and the penalties imposed thereby, a being on shore analogous to that which is the object of penal restraint and correction under those statutes, viz. a departure and absence from the ship by the unauthorized act of the party himself." Yet here, where the substance of the contract and the reasonable intent of the parties is satisfied, the defendant contends that the seaman is entitled to nothing. [*Vaughan* B. That is, to nothing on the articles: the court has no doubt that he is entitled for work and labour on a quantum meruit for the voyage in the *Alexander*. Lord *Lyndhurst* C. B. The difficulty is to get out of the terms of the contract; that is the ground of decision in *Appleby v. Dods* (b).] In *Appleby v. Dods* there was an intermediate voyage, and the ship having been lost on the homeward voyage, the mariner was held not entitled to his wages pro rata on the outward voyage, though freight had been earned on it. That was so held on the policy of stat. 37 *Geo. 3. c. 78.* (c), which statute Lord *Stowell*, in a subsequent

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(a) 4 East, 546.

(b) 8 East, 300.

(c) That act is entitled "An act for preventing the desertion of seamen from British merchant ships trading to his majesty's colonies and plantations in the *West Indies*." After reciting that "seamen and mariners, after entering into articles to serve on board British merchant ships during the voyage from Great Britain to his majesty's colonies and plantations in the *West Indies* and back to Great Britain, frequently desert in such colonies,"

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case of the *Juliana* (a), has decided to be restricted to the *West India* trade, and after reviewing all the authorities thought that such a clause as that now relied on was illegal. That learned person cites *Morrison v. Hamilton* (b) to show that the *Scotch* courts treat a contract so worded as a suspension of the demand, not a limitation of the right. [Lord *Lyndhurst* C. B. The judgment of Lord *Stowell* begins, "this is a divided voyage, in which cargoes successively taken in and delivered at different ports, earned freight for the owners at each port of delivery by the known general law; and by the same general law, wages were earned by the mariners, and freight had been earned in three preceding voyages, to *New South Wales*, *Batavia*, and *Bengal*." Bolland B. In *Appleby v. Dods* the articles were to serve for monthly wages in a ship bound for the ports of *Madeira*, or any of the *West India* Islands, and *Jamaica*, and return to *London*: and the seamen were not to demand or be entitled to their wages, or any part thereof, until the arrival of the ship at the port of discharge. Lord *Ellenborough* said, "The terms of the stipulation are general and include the present case, and we cannot say against the express contract of the parties that the seaman shall recover pro rata, although the ship never did reach the port of discharge named." [Gurney B. In that case freight was earned to *Madeira*, and in the *West Indies*, but not wages.] In two anonymous cases (c) where the voyage had not been completed to the final port, but there were intermediate ports of delivery, it was held by Lord *Holt* that the sailor was entitled to wages to the port of delivery last before the time of the loss, and his opinion was confirmed by a court of equity &c., enacts, that every seaman deserting shall forfeit all the wages he may have agreed for.

(a) 2 Dodson's Admiralty Reports, 508.

(b) Cited in Bell's Comm. on the Law of Scotland, 515.

(c) 1 Lord Raym. 639, 739; 12 Mod. 409, S. C.

in *Edwards v. Child*(a). As to the third point, the seaman has no interest in the ship, his wages depend on freight being earned, and as the full amount of freight was received, and he wished to bring home the oil, his share of the earnings is not subject to deduction in respect of the value of 22 tons of oil, which were sold to pay for repairs (b).

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Shee for the defendant. As to the second point, the plaintiff cannot claim wages on the quantum meruit for his labour in the second ship consistently with the articles of agreement, or if he can, the articles of agreement must be considered at an end. [Lord *Lyndhurst* C. B. There is an end to the claim for wages when the ship is lost, therefore the sailor is to make a fresh contract for the duty which he did in the other vessel.] The implied contract can arise only when the written contract is at an end, but the plaintiff says that bringing home the vessel is a fulfilment of the contract. [Lord *Lyndhurst* C. B. The first transaction is over. The plaintiff says either the contract endured, and therefore I am entitled to my stipulated share, or if not, then the contract is over, and I am entitled on the quantum meruit count.] But the last clause of the articles expressly prohibits the plaintiff from recovering in any other mode than is there specified (c). Then no doubt the whole articles must be taken together, and the sense in which they were understood at the time must be considered in the exposition of such contracts.

(a) 2 Vern. 727. That was a bill filed against the owners by the executors of the captain, to be reimbursed the sums of money which he had been compelled to pay the sailors for wages, by the decision of Lord *Holt* against him, in the case reported 1 Lord Raym. 739. The Chancellor decreed that the owners should pay.

(b) It is believed that this point was conceded by the defendants, nor was it necessary to decide on it.

(c) See *Eakin v. Thom*, 5 Esp. 7.

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But if the terms made use of are plain, the court will not supply an intention to the parties; that is not consistent with the expressions, "*Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est.*" In *Rickman v. Carstairs*, there was no doubt that it was intended that a policy should protect a vessel on a voyage to *Africa*, but as the intention was not plainly stated in the policy, the court would not give it effect. The contract for seamen's wages must always be strictly construed; for though any other contract for service may be verbal, this by 2 *Geo. 2. c. 36.* must be in writing, "in order to prevent the mischiefs that frequently arose from the want of proper proof of the precise sums upon which they engage to perform their service in merchant ships" (a). The important clauses in the articles from which the contract is to be gathered, are the sixth, coupled with the seventh and the twelfth; all the other clauses are merely confirmative. In the sixth clause "until" must be understood as "unless," and the other clauses are consistent with that construction. The clause enabling the owner to sell elsewhere, is an exception, and does not control the clause so as to prevent the construction, that the plaintiff shall not be paid unless the ship arrives in *London* and the cargo be there sold. [Vaughan B. It seems to be inserted to enable the master to decide on the expediency of finding a good market before the ship arrives.] The seventh clause as to the distribution of the proceeds, is on the supposition of a safe arrival of the vessel: it begins "that in ascertaining the net proceeds of the said cargo upon the completion of the said voyage, there shall be charged by the owner &c." There is no provision for any probable loss. The first five clauses, which relate to the duty and liberty of the mariners, on each of

(a) Abbott on Shipping, 433, 5th edit.

which an action would lie for breach of duty, all refer to the ship *Royalist*. [Gurney B. Does any contract for seamen's wages apply to any ship except that on which they embark?] No: but this is more of a partnership adventure(a) than a contract for wages, and there is no authority for saying it is not an insurable interest. The object of it is not a service by the sailors as hired servants, but to contribute their labour as capital in a joint adventure, and to have an interest in the profit depending on their exertions. All parties contemplate a risk. The object of the owners is the safety of the ship, and for this purpose they make the remuneration contingent on her return in safety; the mariners are content to run that risk, in the hope of a possible profit in a ninety-fifth share. If the construction which the defendant seeks is not to stand, the words "to be brought in the said ship" must be erased from the first clause; and in the sixth, instead of "the arrival of the said ship or vessel," the arrival of the cargo must be supplied. The same public policy which makes the wages of sailors not insurable, sanctions this construction of the clause, in order to insure the best exertions of the crew for the safety of the ship; "for if the mariners had their wages where the ship perishes by tempest, they would not use their endeavours nor hazard their lives to save the ship(b)." There is no pretence for imputing fraud or oppression in these articles, and it appears by the articles of the fishers in *Holland*(c), that such a stipulation is not considered unreasonable by the mariners themselves; "for as in the whale fishing trade, the ship goes out clean and returns full, the salvage is

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(a) *Wilkinson v. Frasier*, 4 Esp. 182, *semb. cont.*

(b) 1 Sid. 179 and 236.

(c) See Scoresby's *Voyage to the Arctic Regions*, vol. ii. 272, cited in argument.

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so high that it is not worth while, it is therefore reasonable that the captain and crew should have nothing on the goods." But if there is any hardship in the contract, it is not greater than in cases where the owner cannot recover any freight because the ship has not arrived at a stipulated port of delivery, as in *Cook v. Jennings* (a), which was an action of covenant on a charter-party of affreightment on a ship from *Liverpool* to *Wyburgh*, and back to *Liverpool*; the freight to be paid, one-fourth in cash on her arrival, and the remainder by bill, accepted at four months. The ship was lost, after having performed great part of her voyage homewards, but before her arrival at *Liverpool*; and Lord *Kenyon* in giving judgment said, "the question is, whether or not the owner can enforce payment of the money under this contract, not having carried the goods to *Liverpool*, and the defendant having only undertaken to pay on their delivery at *Liverpool*; in answer to this action the defendant has a right to say, "non hæc in foedera veni." So, in *Bright v. Cowper* (b), where the covenant was, that if the plaintiff would bring his freight to such a port, the defendant would pay him such a sum, and part of the goods were taken by pirates, and the residue were brought to the place appointed, the court held that the defendant ought not to pay the money, because the agreement was not performed. As to the owner being able to insure his freight, he buys his indemnity with money; the mariner would be in the same state if a like deduction from his wages were made for an indemnity, but he has no right to complain, as he pays no premium. This is conformable to the legal principle on which wages depend, for if freight is the mother of wages, safety is

(a) 7 T. R. 381.

(b) 1 Brownl. 21, cit. Abbott on Shipping, 319, 5th edit.

the mother of freight; and the ship not having arrived in safety at *London*, her port of discharge, no freight is due, and as wages depend on freight, the articles do no more than the common principles of law, and no wages are due. Where a ship set out on a trading voyage to the coast of *Africa*, and thence to *America*, but before that was to cruise as a privateer, an officer who had engaged to serve on board for certain monthly wages during the voyage, one half of them to be received at the port of delivery in *America*, and the other at the port of discharge in *Great Britain*, and also for a share of all prizes, admitted by him to have been received, was held not to be entitled to any part of the wages, where the ship was taken before she completed her voyage, although he had been sent out of her before her capture, as prize-master on board a prize taken in the voyage; Lord *Mansfield* saying, "the question is, whether the plaintiff can now make any demand, in the nature of wages, for the time he had the care of the prize. The ship sets out in a double capacity, she is to perform a trading voyage, but before that she is to cruise three months as a privateer; all demand on account of the trading voyage is gone; but in her character of privateer the crew are entitled to no wages; they all run equal risks, and take their chance in their respective shares in prizes;" *Abernethy v. Landale*(a). So in *Vin. Ab. tit. Mariner*, A. 2. pl. 15(b)." If the ship do not return, but is lost by tempest, the mariners shall lose their wages, for otherwise they will not use their best endeavours, nor hazard their lives to save the ship." So, where a sailor contracted to have wages provided he proceeded, continued, and did his duty as mate in a ship from *Jamaica* to *Liverpool*, but died before the voyage ended; it was held that no wages could be claimed,

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(a) Doug. 520.

(b) Vol. xv. 235.

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either on the contract or the quantum meruit; *Cutler v. Powell*(a). These cases show there is nothing unreasonable in the stipulation, because, if there had been no articles, the principles of law would in the same manner restrict the seaman from recovering his wages. Where the contract was for a voyage to *Newfoundland* to take in a cargo, and thence to *Spain* or *Portugal*, or some part of the *Mediterranean*, and the ship was taken, after loading at *Newfoundland*, but before its arrival at any port of delivery, it was held that the contract was entire, and no freight nor wages due; *Herniman v. Bowden*(b). This case, by substituting "the *South Sea*" for "*Newfoundland*," exactly resembles that. But *Appleby v. Dods* is conclusive in favour of the defendant, and it is stronger than the present case, because freight was there earned for the intermediate voyages, and therefore wages would have been due, if they had not been excluded by the express terms of the contract. There is nothing in the judgment of Lord *Ellenborough* to show that the case depended on 37 G. 3. c. 73. but on the terms of the contract, which were general. [*Vaughan* B. The articles are in a schedule to the act, 37 G. 3. c. 73.] Then we have the sanction of the legislature as to their form, and they are treated as generally applicable in *Abbott on Shipping*(c). [*Gurney* B. The statute makes it peremptory in voyages to the *West Indies*, and then the parties in other voyages adopt them.] In *Beale v. Thompson*(d) the freight had been earned, and because the absence of the seaman was involuntary, it was held that he was entitled to wages. [Lord *Lyndhurst* C. B. Suppose that in the ordinary case of a charter-party the ship is lost, and the cargo transhipped to another vessel, you would not be bound to pay freight on the charter-party,

(a) 6 T. R. 320.

(b) 3 Burr. 1844.

(c) Appen. 493, 5th edit.

(d) 4 East, 546; 1 Dow, 299, S. C.

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but on the implied contract; for if the goods are accepted, it has never been disputed that the owner would be liable to pay freight for them, though by their having been shipped in another vessel by the captain, it may happen that the charter-party has not been complied with.] But it has never been decided that if the ship is lost the freight is payable. [Lord *Lyndhurst* C. B. Freight would be paid on the implied contract, if the goods are delivered by another ship, though it has not been earned under the charter-party.] Here there is a written contract; the plaintiff cannot resort to an implied contract. [Gurney B. Though strictly speaking no freight is here earned, the owner has, by the joint adventure, to receive a value which is equivalent to the freight, for the use of the vessel fitted out. The defendant must stand on the express words of the contract.] The defendant relies on the words, and the above cases were cited in answer to the suggestion of hardship to the plaintiff, because they show that it is reasonable that wages should not be due, where freight is not earned. Lord *Stowell* (a) calls such stipulations illegal, citing *Buck v. Rawlinson* (b), to show that the Admiralty Court decided, that even where the seamen had given bonds to the master not to demand any wages unless the ship returned in safety from a voyage to the *East Indies*, and she was lost in the *Hoogley*, after delivering part of her outward cargo, that they were still entitled to wages for the outward voyage," and he says the payment to the mariners was affirmed by the House of Lords; but the question before the House of Lords was, whether the lord keeper *Wright* had properly dismissed the bill of the captain against the *East India Company*, the owners, for reimbursement of wages which he had been compelled to

(a) In the case of the *Juliana*, 2 Dods. 211; 2 Bro. Parl. C. 102.

(b) 1 Bro. Parl. Cas. 137.

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pay by the court of admiralty. [*Vaughan B.* They reversed both orders, and gave leave to appeal to the delegates.] Lord *Stowell* also relies on *Edwards v. Child(a)*, in which Lord *Holt* was said to have decided in the same manner as *Buck v. Rawlinson*, but that was a divided voyage. On both these cases it is observed in *Abbott on Shipping(b)*, that the author was at a loss to find any principle upon which a court of admiralty could have held these bonds to have been void, or have thought seamen entitled to more than a proportion of the advance money, unless the bonds were deemed to have been obtained by oppression or fraud. Again, the judgment of Lord *Stowell* in the case of the *Neptune(c)* is not consistent with that in the case of the *Juliana(d)*; he says, "The maxim that freight is the mother of wages, though generally received like most other maxims delivered in figurative terms, certainly is not formed with real and strict accuracy. For the natural and legal parents of wages are the mariners' contract, and the performance of the service covenanted therein; they, in fact, generate the title to wages." Here, then, he admits that the wages are controlled by the contract of the parties, and differs from himself in the case of the *Juliana*, "where," he says, "the payment of wages is generally dependant on the payment of freight; if the ship has earned its freight, the seamen who have served on board the ship have in like manner earned their wages; and as in general, if a ship, destined on a voyage out and home, has delivered her outward-bound cargo, but perishes in the homeward voyage, the freight for the outward voyage is due, so in the same case the seamen are entitled to receive their wages for the time employed in the outward voyage, and the unlading the

(a) 2 Vern. 727.

(b) Page 448, 5th edit.

(c) 1 Hagg. 227.

(d) 2 Dods. Adm. R. 504.

cargo, unless by the terms of the contract the outward and homeward voyages are consolidated into one. As to *until*, it is not a term of postponement, but a condition precedent. [Lord *Lyndhurst* C. B. It is clear from the schedule to 37 *Geo.* 3. that it is not intended by the legislature to be a postponement, and as the words of the agreement are adopted from the statute, they therefore must receive the same interpretation.] Lord *Stowell*, upon these contracts, observes:—"Mr. *Bell* seems to think that if the agreement were more clearly expressed it would be held effectual in *Scotland*. The probability of such an expectation is not, I think, fortified by what immediately follows, that in the case of *Ross v. Glassford*, in which the party founded upon a custom in a particular port to make such agreements, the court declared, that if such a practice did exist, it was highly to be disapproved of, as fraught with inhumanity, and destructive to trade, and that it was time it should be corrected. If so, clearness of expression for such a purpose would not be likely to facilitate its reception." [Lord *Lyndhurst* C. B. Mr. *Bell* cites *Morrison v. Hamilton* as an authority for the limitation of the right. The point in controversy is about "unless" and "until;" if unless were inserted, it would not be a mere suspension of right. Lord *Stowell* cites *Bell* as a text writer, but relies on the *Scotch* cases. The balance of authorities stands thus: the *Scotch* courts are equally competent to put a construction on articles as our courts are. Then on one side *Appleby v. Dods* is decided, on the other, *Morrison v. Hamilton*, together with that decision by Lord *Stowell*. The point which weighs with me is, that in *Appleby v. Dods*, where it was decided that the construction of the articles in stat. 37 *Geo.* 3. c. 73. is that which the defendant contends for here, so that when these words are adopted from the

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act, it appears the intention of the parties that they should bear the same construction. Lord *Stowell*, in the *Juliana* case^(a), takes a distinction between his situation and Lord *Ellenborough's* as enabling him to exercise an equitable jurisdiction^(b).] He seems to think that the common law is unable to reach the real justice of a case, but in fact it is an old cause of quarrel between the courts of admiralty and common law, ever since the time of *Ric. 2.* and caused the 13 *Ric. 2.* st. 1. c. 5., and 15 *Ric. 2.* c. 3. to define the limits of the admiralty jurisdiction^(c). Since these statutes the cognizance of that court has generally been stopped by prohibition; the *Mariner's* case^(d), *Opy v. Child*^(e), *Day v. Serle*^(f), *Anon.*^(g). In the *Juliana*^(h) case, the court of admiralty decided that a bond for making the payment of wages conditional, on the return of the ship to the port of discharge, was illegal; but if the suit which is begun there on the agreement be special or under seal, a prohibition shall go to the admiralty court, *Howe v. Nappier*⁽ⁱ⁾. The case of the *Juliana*, therefore, was coram non iudice. [Lord *Lyndhurst* C. B. The parties did not dispute the jurisdiction.] Every case is coram non iudice if the judge had no jurisdiction to decide, though the parties do not insist on

(a) 2 Dods. Adm. R. 521.

(b) In *Edwin v. East India Company* the charter-party provided, "that until six days after the ship shall have returned to the port of London, and made a right and full discharge of all her lading, the company are not to pay, nor to be liable to any of the sums of money agreed on for freight," it being the intent of the parties that if the ship should be lost, either in her outward or homeward-bound voyage, nothing should be paid by the company. The ship was declared not seaworthy at her outward port of discharge, and there left. The Lord Chancellor King decreed, that "though the charter-party is so penned that nothing can be recovered at law, yet the plaintiffs had a just demand, and ought to be relieved in equity." 2 Vern. 210.

(c) *Abbott on Shipping*, 481, 5th edit.

(d) 8 Mod. 379.

(e) 1 Salk. 31.

(f), 2 Stra. 908.

(g) 1 Sid. 179.

(h) 2 Dods. 504.

(i) 4 Burr. 1944.

that defect. [*Vaughan B.* The judge also administers justice to a sailor by a different standard than to other people, because he says *nauta non legit ut clericus*.] Therefore the parties are bound by their contract according to the common understanding of the terms. *Pothier* says there are four modes of hiring seamen, one by the voyage, the second by the month, the third by the profits, the fourth by the freight, and only those engaged under one of the first two modes are entitled to recover wages.

Comyn in reply. *Howe v. Nappier* does not affect the question, because as the owner did not move for a prohibition the jurisdiction of the court was not disputed. Neither do the cases cited touch the construction of this clause, because they are all on articles applicable to the voyage in each particular case; and, except in *Cutler v. Powell*, the voyage out and home had not been performed; but here, the voyage to the *South Sea* and back to *London* has been completed, and the cargo when delivered has been accepted. In *Cook v. Jennings (a)*, the vessel never reached *Liverpool*, where the cargo was to be delivered. [*Lord Lyndhurst C. B.* There the action was on the charter-party, and it was decided that such action did not lie, because the terms of the charter-party had not been performed.] The only case decided on this clause, which is adopted from the stat. 37 *Geo. 3.*, is the case of the *Juliana*, and that is expressly with the plaintiff; *Appleby v. Dods* was decided on a different point. This has been assimilated to the case of freight, which it is said would not be earned; but on these articles freight would be earned when the cargo has arrived and been accepted. [*Lord Lyndhurst C. B.* If that is so, wages necessarily follow.] The word *until* is

(a) 7 T. R. 391.

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only a postponement of the time of payment, not a condition precedent, because in *Cook v. Jennings*, *Lawrence J.* says, "when a ship is driven on shore it is the duty of the master either to repair his ship or to procure another, and having performed the voyage he is then entitled to his freight;" therefore if here he has performed his duty by finding another ship, and the cargo has arrived, an action may be maintained for the freight. The safe arrival of the cargo is the essence of the contract, and it would be sufficient by the general rule that the performance of the substance of a contract is enough, even in words of condition; *Com. Dig. tit. Condition*. In *Appleby v. Dods* the clause about desertion makes the distinction between the performance of the voyage and the arrival of the identical ship; though in that case there were intermediate voyages, the substantial agreement was for a voyage out and home. [Lord *Lyndhurst C. B.* This is a case in which the party would have been entitled to wages for the voyage had it not been for that clause: then the decision of the court in *Appleby v. Dods* (a), on that clause is against the plaintiff's claim. In that case the "port of discharge above mentioned" must have meant *London*. There are precisely the same words quoad this question; there were successive voyages, and freight earned at three places, and the sailor would have been entitled to wages in respect of them, though the ship was lost on her voyage from the third place.] The contract there was, that no seaman should be entitled to his wages, or any part thereof, until the arrival of the ship. They are very material words to exclude the mariner from recovering wages for the outward voyage. [Lord *Lyndhurst C. B.* The reason for laying such stress upon "or any part

(a) 8 East, 300.

thereof," was, that the voyage was divisible there, it is not so here.] The whole voyage is performed, though not in the same ship. [Lord *Lyndhurst* C. B. The intermediate voyage was performed in *Appleby v. Dods*.] "Any part thereof," are very material words to exclude the mariner from recovering wages for intermediate voyages, to which he would have been entitled if that had been struck out. The case of the *Juliana* has been treated as an authority by the *American* courts since *Appleby v. Dods*, and is recognized in p. 488, of an edition of *Abbott on Shipping* by Judge *Storey*, who cites *Johnson v. Sims*, *Peter's Admiralty Reports*, and *Swift v. Clark*, 15th *Massachusetts's Reports*.

Cur. adv. vult.

The judgment of the court was now delivered by

LORD LYNTHURST C. B.—This was an action brought by the administrator of *Jesse*, a mariner, to recover a sum of money claimed to be due for services on board a vessel called the *Royalist*, while on a whaling adventure to the *South Sea*. By the articles it was stipulated that the intestate should receive a certain share of the net proceeds of the cargo, which should be procured and brought in the said ship to *London*. In the articles were the following stipulations, on which the question turns:—"That no one of the ship's company shall be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship at *London*, and her said cargo shall be there sold and delivered, and the money for the same actually received by the owner; nor unless he shall have well and truly performed the above-mentioned voyage according to the true intent and meaning of these articles." The vessel proceeded on her voyage in the summer of 1829, and procured a cargo of oil, but was so much damaged by tempe-

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trous weather, that when taken into port in the Isle of *Timor*, for repairs, it was found impossible to repair her there or elsewhere, and she was in consequence condemned; some part of the cargo had been sold before to pay for repairs at *Manilla*, but what remained after she was condemned was transhipped into two vessels; one part into the *Hope*, the other part into the *Alexander*, that came by way of *Batavia*. The intestate embarked with that part of the cargo which was put on board the *Alexander*, but died before the ship reached *London*. The question is, whether, under these circumstances, his administrator can recover his wages? Now that right depends entirely on the contract; and I know no principle by which a contract entered into by mariners is to be construed differently from those made among other persons. The language here is clear and distinct, that he is not to receive his share of the cargo till the arrival, not of the cargo only, but of the vessel, in the port of *London*; and we are of opinion, that in this contract this administrator is not entitled to recover. Nor is this the first time that the question has been brought before a court; for the stipulation in *Appleby v. Dods* (a) is in substance the same as the present. That was a voyage "for the ports of *Madeira*, any of the *West India* islands, and *Jamaica*, and to return to *London*, at monthly wages; and it was agreed that no seaman should demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above-mentioned port of discharge." The ship sailed with a full cargo to *Madeira*, and thence to *Dominica*, and afterwards to *Kingston* and the *West Indies*, *Port Antonio* in *Jamaica*, and then proceeded to *Martha Bray*, in the same island, delivering goods and taking

(a) 8 East, 300.

in a new cargo at each port successively, and earning freight in the first two stages of her voyage. The ship set sail from *Martha Bray*, her last port of delivery in *Jamaica*, but was lost on that her homeward voyage. It is clear that, independently of any express stipulation, freight having been earned at each port of delivery, the mariners were in that case entitled to wages pro rata. The question was, were the mariners entitled to wages in such case, notwithstanding the contrary stipulation in the articles, the terms of which were, that "no seaman &c. shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the port of discharge, and her cargo delivered?" At first, at nisi prius, Lord *Ellenborough* thought the stipulation so precise that the mariner could not recover, and accordingly nonsuited the plaintiff; and on motion for a new trial the court of King's Bench confirmed his opinion, being clearly of opinion that the stipulation was express and precise; that unless the ship arrived in *London* the mariners were not entitled to wages. But in opposition to this case, which was decided in a court of common law, the case of the *Juliana* in 1822(a) was quoted, in which Lord *Stowell*, then judge of the court of admiralty, in delivering his judgment drew a distinction between courts of common law and a court of equity, in the following words: "A court of common law works its way to short issues, and confines its view to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination on the real justice of the case. This court does not claim the character of a court of general equity, but it is bound by its commission and constitution to determine the cases submitted to its cognizance upon equitable principles,

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(a) 2 Dods. Adm. R. 504.

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and according to the rules of natural justice." It seems to me, that in the case of the *Juliana*, Lord *Stowell* misapplied the decision of Lord *Holt* in the *Anonymous case* (a), as if Lord *Holt* thought the bonds illegal and invalid; but Lord *Holt* was not called on to decide that point, or any thing more than, as explained by *Lawrence J.* in *Appleby v. Dods* (b), that the mariners were entitled to recover according to general principles of law. Again, Lord *Stowell* misunderstood the case of *Appleby v. Dods*, in supposing that that decision rested on its being a *West India* voyage; that that circumstance formed no ingredient in the judgment, appears from the words of Lord *Ellenborough*:—"The terms of the contract are quite clear and reasonable; and though the reason of this stipulation was no doubt to oblige the mariners to return home with the ship and not desert her in the *West Indies*, yet the terms of it are general and include the present case; and we cannot say against the express contract of the parties, that the seamen shall recover *pro ratâ*, although the ship never did reach her port of discharge named." That decision then turned not on the nature of the voyage, but on the large and express terms of the contract. As to *Buck v. Rawlinson* (c) and *Edwards v. Child* (d), which are cases decided in equity, it is extremely difficult to learn from the reports what were the grounds of the decisions; but enough appears from them for us to see that they were decided upon principles of equity, and not on any data binding in a court of law. This question being agitated here must be decided on principles applicable to these courts, and as the clause is clear and distinct, the plaintiff ought not to recover on the articles. With respect to ser-

(a) *Ld. Rayn.* 637.(c) 1 *Bro. P. C.* 137.(b) 8 *East*, 304.(d) 2 *Vern.* 727.

vices since performed in the *Alexander*, it is admitted that the plaintiff is entitled to recover on the quantum meruit count.

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Judgment for the defendant on the special counts.

DOE on the demise of GILLETT *against* ROE.

MANSEL moved to set aside a declaration in ejectment and the service thereof, for irregularity. The declaration was of *Easter* term, entitled generally (a) of that term, beginning, *John Doe*, a debtor to our sovereign lord the king, comes before the barons of his majesty's exchequer &c., and concluded to the damage of the said *John Doe*, whereby he is the less able to satisfy &c. He contended that the declaration should have been according to the form in *Reg. Gen. Mich.* 3 *W.* 4. No. 15. [*ante*, Vol. III. p. 5.] *A. B.* by *E. F.* his attorney, complains of *C. D.* who has been summoned, &c. For the direction is general, "that every declaration shall in future commence as follows." In *Hirst v. Pitt* (b), this court held the old jurisdiction by quo minus to be at an end, since 2 *W.* 4. c. 39. c. 14., the uniformity of process act.

A declaration in ejectment must begin and conclude with the quo minus clauses, as before 2 *W.* 4. c. 39. the uniformity of process act, the general rules of *Mich.* term 3 *W.* 4. No. 15. not being applicable to any but actions merely personal.

PARKE B.—The action of trespass and ejectment is a mixed action. Now the rules of *Michaelmas* term 1832 are rules agreed upon by the judges in pursuance of the statute for the uniformity of process 2 *W.* 4. c. 39., which statute is intituled "An act for the uniformity of process in *personal* actions in his majesty's courts

(a) This was also contrary to *Reg. Gen. M.* 3 *W.* 4. No. 15. *ante*, Vol. III. p. 5.

(b) *Ante*, Vol. III. 264.

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of law at *Westminster*." Then that act applies to personal actions only, and not to ejectments; the general rules which were framed in order to enforce that act only cannot have a larger operation.

Rule refused.

FIDGETT *against* PENNY.

A plaintiff sued on an account stated on the 5th February, the balance of which was in his favour. The defendant sought to give in evidence a subsequent account stated on 10th March, in which the balance was against the plaintiff. Held, that as the action was commenced after the new general rules of *Hil. 4 W. 4.* came into operation, the defendant could not prove the second account stated, on the plea of non assumpsit only, but should have pleaded payment or a set-off.

ASSUMPSIT for money had and received, and on an account stated, brought since the rules (*Regule Generales*) of *Hilary* term 4 *W. 4.* came into operation. Plea: non assumpsit. The particulars of demand were for a balance of money due to the plaintiff, on an account stated with the defendant on 5 February. The trial was before the secondary of *London* under a judge's order, pursuant to 3 & 4 *W. 4. c. 42. s. 17.* The plaintiff having proved an account stated with the defendant on 5 February, sought to recover a balance which appeared due to him thereon. The defendant, on the other hand, opened that on the 10 March another account was stated between the parties, including the items of the former, and also a sum due from plaintiff to defendant, which turned the balance due against the plaintiff. For the plaintiff, *Reg. Gen. Hil. 4 W. 4.* relating to pleadings in assumpsit, No. 1. [see pp. xiv. xv. in this Vol.] having been cited, it was objected that the defendant could not give the second account stated in evidence, under the general issue non assumpsit, and the secondary having ruled accordingly, the plaintiff had a verdict for the balance due on the first account stated, with liberty to the defendant to move to set it aside, and enter a verdict for the defendant. A rule having been obtained according to the leave reserved, and also for a new trial,

Butt who was to show cause was stopped by the court; who called on

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Heaton to support the rule. The general issue in fact denied the particulars of the plaintiff's demand. The second account stated showed that at the time of the action brought, the plaintiff had no right of action against the defendant on the first account stated, which he relied on. Then it should have been received in evidence. If this be otherwise, the plaintiff may always rely on the first account stated, in which the balance is in his favour, notwithstanding a series of subsequent accounts, on which he is a debtor.

LORD LYNTHURST C. B.—The day in the declaration is immaterial, but the particulars of demand fixed the time when the first account was stated, and showed the defendant that the action was brought on that account. The plaintiff then had a clear cause of action, to which the defendant set up as an answer, that on a subsequent account stated, including the former items, the balance was in his favour. Then payment might have been pleaded (a), or if the new items did not form part of the account stated, they were a distinct demand on the defendant's part, which might have formed the subject of a plea of set-off. But, since the rules of *Hilary* term there is no answer to this action, under the plea of *non assumpsit*.

ALDERSON B.—The defence on the second account, was either on the ground of payment or a set-off, neither of which could be given in evidence under the general issue.

GURNEY B. concurred.

Rule discharged.

(a) See *Reg. Gen. Hil. 4 W. 4. Pleading in Assumpsit* I. No. 2.

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JACOBS *against* PHILLIPS.

The trial of a cause was postponed by order of a court of nisi prius, on the defendant's application, on the terms of his paying the plaintiff his costs of the day. The order of nisi prius was made a rule of court, and the costs were taxed, after which the defendant became bankrupt. Held, that he was discharged by his certificate as to these interlocutory costs so ascertained before the bankruptcy.

A certificated bankrupt cannot be discharged from arrest for a debt covered by his certificate, till it has been inrolled pursuant to 6 G. 4. c. 16. s. 96.

A RULE had been obtained by *Follett* for discharging a certificated bankrupt out of custody, on an attachment for non-payment of costs. The following appeared on the affidavits:—This action (case for an excessive distress) had been called on for trial at the *Guildhall* sittings on the 23 *December* last, when, in consequence of the absence of a necessary witness on behalf of the said defendant, the trial was, by order of nisi prius, postponed till *Hilary* term, on payment of the costs of the day by the defendant. Those costs were shortly afterwards taxed at the sum of 131*l.* 9*s.*, upon an affidavit of the plaintiff and a clerk of the plaintiff's attorney, that fifteen witnesses were subpoenaed and in attendance on the part of the plaintiff. The order of nisi prius was made a rule of court in *Hilary* term, and, by an order of a baron, made on application of the plaintiff on 28 *January*, the trial was postponed until the costs of the day should be paid by the defendant, pursuant to the rule of court.

On 24 *January* a fiat in bankruptcy was issued against the said defendant, under which he was declared a bankrupt. The defendant was taken into custody on or about the 21 *April*, upon and by virtue of an attachment issued out of this court for non-payment of the said sum of 131*l.* 9*s.*; a previous demand thereof having been made from him. The defendant had obtained his certificate duly granted to him under the said fiat, bearing date 22 *April*, and confirmed by the Court of Review in bankruptcy on 17 *May*. The usual summons having been taken out for the discharge of the bankrupt, Baron *Gurney* declined to

make an order, giving leave to the defendant to apply to the court.

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Hutchinson showed cause. First, as it does not appear that the certificate is inrolled of record according to 6 G. 4. c. 16. s. 96., the plaintiff has no knowledge of its existence.

Follett contra. By sect. 121 and 126 the bankrupt is entitled to his discharge on the certificate being "signed and allowed." The arrest may take place immediately after the allowance, and before inrolment would be possible. The allowance is here sworn to.

LORD LYNDEHURST C. B.—By 6 G. 4. c. 16. s. 126., in cases where a bankrupt is taken in execution or detained in prison on a *judgment* obtained before allowance of his certificate, a judge may order his discharge, on the producing his certificate (a). It does not appear to me that the defendant is in a different situation from that in which he would be called on to produce his certificate. Now we could not read it, if produced, till it had been inrolled; and the affidavits are only a substitute for that necessary production. Enlarge the rule till the document is inrolled. If our decision is in favour of the defendant, he will be entitled to his discharge immediately on the inrolment taking place.

It being agreed to argue the main point in the interim,

Hutchinson proceeded to show cause. By sect. 121 a bankrupt is only discharged by his certificate from

(a) See *Nowers v. Colman*, Buck, 5; *Baker's case*, Stra. 1159; *Ex parte Parker*, 3 Ves. 534.

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all debts due by him when he became bankrupt, and from "all claims or demands made by this act provable under the commission." Sect. 126 is to the same effect. The right of the creditor to prove, and of the bankrupt to be discharged under the commission, are co-extensive(a). Is it a "claim or demand" made provable under his commission by 6 G. 4. c. 16? There are no words in that act like those in 7 G. 4. c. 57. s. 60., and by which an insolvent debtor is relieved from imprisonment for costs with respect to which he shall have become entitled to the benefit of the act(b). Discharges of bankrupts are governed by sect. 121; now the words in that section "claims and demands," refer to such claims and demands only as might ultimately have become debts, e.g. bonds &c. payable at a future day, and annuities, the value of which can be ascertained, though only payable at future times.

Then, can these costs be said to be a *debt* within sect. 121. "due by the defendant when he became bankrupt," for which an action could have been maintained against him, or on which a fiat could have issued against him? It is not such a *debt*, unless a fiat could have issued on it against him. Several cases establish that no action can be maintained on an order of court for payment of costs on an interlocutory proceeding; *Emerson v. Lashley*(c), *Fry v. Malcolm*(d). So no action will lie for interest and costs payable by a decree of a court of equity; *Carpenter v. Thornton*(e). *Ex parte Stevenson*(f) goes further, and decides that taxed costs on a judgment as in case of a nonsuit, under a rule of court, do not constitute

(a) Per Lord Hardwicke, 1 Atk. 119; 1 Deacon's Bank. Law, 596.

(b) See sect. 50.

(c) 2 H. Bla. 251.

(d) 4 Taunt. 705.

(e) 3 Bar. & Ald. 52.

(f) 1 Mont. & M'Arthur, 262, Shadwell V. C.

a petitioning creditor's debt, such costs being recoverable only by attachment in the nature of an execution. But it will be argued, that the order in this case was founded on an agreement between the parties (a).

An agreement is a compact, an accord of the parties; whereas the plaintiff made every objection in his power to the postponement of the cause. That event took place against his will, and to his injury. Nor does the order of the court amount to more than indemnifying him for his costs incurred in fruitless attendance on that day. This subsequent attempt to enforce the order by attachment will not be said to amount to an agreement. How could it be declared on as such? In *Riley v. Byrne* (b), the defendant had agreed, on good consideration, *vis.* the compromise of an action against him for libel, to pay what should be found due for the plaintiff's costs. The master's allocatur operated as an award, and the amount might have been proved under the commission. That decision turned on the agreement made in pursuance of the compromise. In *Rex v. Edwards* (c) the attachment issued for a debt from the defendant to his employer *Long*, existing before the bankruptcy. So in *Ex parte Eicke, in re Harper* (d), there were two sums due before the bankruptcy, to which the costs recovered attached themselves. [*Alderson B.* Had that case occurred now, it would have fallen within the express words of 6 G. 4. c. 16. s. 58.] *Ex parte Hill* (e), in which Lord Chancellor *Eldon* reviewed all the previous cases, also shows, that the principle on

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(a) In *Smith v. Whalley*, 2 Bos. & Pol. 489, it was held that assumpsit would lie on an agreement between the parties to a suit in Chancery to pay a solicitor's bill, which had been made a rule of that court.

(b) 2 Barn. & Adol. 779.

(c) 9 Barn. & Cress. 652.

(d) 1 Glyn & Jam. 261.

(e) 11 Ves. 646.

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which the courts have acted is, that the costs, being merely accessorial to the debt, are so incorporated with as not to be separable therefrom by the bankrupt's discharge from it, so as to make him liable for them after that event. Here the cause is still pending; whereas in those cases the costs were incurred in prosecuting claims barred by certificates. In no case has a bankrupt been discharged under his certificate from payment of costs, unless they were consolidated with, or accessorial to some debt or claim proved or provable under his commission.

Follett contra. There is no necessity to decide that this is such an agreement as would support an action. It is argued that a bankrupt's certificate has not efficacy to discharge him, unless in the case of a debt on which an action could be maintained; but many claims, which could not be enforced at law as debts, may be proved under his commission, and barred by his certificate (a). The rule is, that if there be any demand *ascertained* or completed before the bankruptcy, which the bankrupt might have been compelled to pay, he is discharged from it by his certificate, whether the remedy against him was at law or in equity, or only by attachment in either jurisdiction. Now in this case the taxation of costs and *allocatur* were before the bankruptcy. There is a plain distinction between such a debt as would be sufficient to support a commission, and a debt, claim or demand, which by the bankrupt laws might be proved under it, and would be barred by a certificate: for though the first must be a legal debt, many demands of a different nature might be proved under a commission. That is the ground taken by Mr. *Abbott* in argument, and acted on by the court in *Ex parte*

(a) See s. 50—58,

Charles(a), where it was held that damages recovered against a defendant, who between verdict and judgment committed an act of bankruptcy, did not form a good petitioning creditor's debt, whereon to found a commission. The present Lord *Henley*, in his *Bankrupt Law*(b), says, "The petitioning creditor's debt must be a debt at law. Therefore the assignee of a bond cannot be a petitioning creditor." For the same reason one partner cannot sue out a commission against another on any debt arising out of a partnership transaction(c). In *Gregory v. Hurrill*(d), the question was, whether a debt, barred by the statute of limitations at the time of issuing the commission, was such a debt as would support it. Continuances had, after the issuing the commission, been entered on the roll, in an action commenced against the bankrupt more than six years before. The debt was provable under the commission, and barred by the certificate, and the court of Common Pleas, on a case sent for their opinion by Lord *Eldon*, held, that it would be a good petitioning creditor's debt. The Lord Chancellor, being satisfied with that opinion, sent another case to the court of King's Bench, who held that it was not such a debt as would support the commission, and the cause was afterwards decided according to that opinion. Again, proof may take place in respect of legacies, assessed taxes, church and highway rates(e), though no action would lie for them.

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(a) 14 East, 210. relied on in *Walker v. Barnes*, 1 Marsh, 346; 5 Taunt. 778, S. C.; and see since 6 Geo. 4. c. 16. s. 56; in *Biré v. Moreau*, 4 Bing. 57; *Atwood v. Partridge*, id. 309; *Boorman v. Nash*, 9 B. & C. 145.

(b) 3d edit. p. 42.

(c) Deacon's Bankrupt Law, Vol. I. 88.

(d) 3 Brod. & Bing. 212; S. C. 1 Bing. 324; and finally, 5 B. & C. 341; see also *Taylor v. Hipkins* and ——— v. *Gregory*, 5 B. & Ald. 489.

(e) *Henley's Bankrupt Law*, 3d ed. 102; 1 Deacon, 223, 301.

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The test then, whether a bankrupt is discharged by his certificate as to a particular demand, is not whether an action could be supported for it, but whether its amount is liquidated and ascertained before the bankruptcy. For if it is, and could then be enforced in any manner whatever, there is no case which impugns the position that it is provable, and that the certificate operates as a discharge. The policy of the bankrupt laws is to free the bankrupt from all his liabilities, after he has given up all his property. In every case, where a bankrupt's certificate has been held not to discharge him from payment of costs, the judgment has not been signed or costs taxed before the bankruptcy (a). So in cases of damages recovered in actions of tort, the question has been, whether the verdict was obtained before or after the act of bankruptcy; and though *Ex parte Charles* shows that damages recovered in tort do not form a good petitioning creditor's debt, if an act of bankruptcy intervene before judgment signed, it does not show that they might not be proved under the commission, or be barred by the certificate. In *Ex parte Hill* (b) the verdict as well as the judgment was after the act of bankruptcy; and Lord *Eldon* decided, that, whether they were obtained for an antecedent debt by contract (c), or for mere damages in tort, the costs could not be proved as a debt under the commission. That was so held, because the costs were not liquidated or ascertained at the time of the bankruptcy, so as to be provable under the commission (d). [Lord *Lyndhurst* C. B. Without question costs are barred by a certificate, when connected with a provable demand;

(a) See cases cited, *ante*, 657, n. (a); and *Wyborne v. Ross*, 2 Taunt. 68; 1 Rose B. C. 112 S. C.

(b) 11 Ves. 646.

(c) *Willatt v. Pringle*, 2 New R. 196.

(d) See *Ex parte Todd*, *con. Lord Keeper Henley*, as stated 11 Ves. 648, 652.

for instance, where the cause of action is in contract, and the verdict has been obtained before, but the costs are not taxed or judgment signed till after the bankruptcy (a). This is a case of interlocutory costs.] It is here submitted for the bankrupt, that where the amount of a pecuniary claim is ascertained before the bankruptcy, it is barred by the certificate, whatever may be the means of enforcing it. The cases of disobeying a subpoena, or any matter of a criminal nature, would be different (b). Nor is the argument affected by the cases which decide that an action will not lie on an order at law for costs, or on a decree to the same effect in equity. It has been attempted to argue, from *Carpenter v. Thornton* (c), that because a specific sum, awarded to a party by a decree of a court of equity, upon equitable considerations only, could not be recovered at law, it was not provable under a commission against the defendant; but equitable debts and demands are constantly proved, and in that case the demand being of a sum ascertained before the bankruptcy, was clearly provable. Again, though partners have not in general a remedy against each other at law, yet if one files a bill against another, and has a decree against him for a sum of money, though no action would lie against him to recover it, it is clearly provable under his commission. In cases of bankruptcy, of a collection of taxes, &c., though the inhabitants would be bound to pay the taxes again, no action would lie by them. [Alderson B. In such cases there was generally a remedy against the party's goods, which are made re-

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(a) See 1 Deacon's Bankrupt Law, 277; *Ex parte Haynes* and *Poucher*, 1 Glyn & J. 107. 385; *Beeston v. White*, 7 Price, 209; *Jameson v. Campbell*, 1 B. & Ald. 250; *S. C. in Error*, 1 Bing. 320; *Dimdale v. Eames*, 2 Brod. & B. 8.

(b) See *Res v. Davis*, 9 East, 318; and see 1 Deacon, 623.

(c) 3 B. & Ald. 52.

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sponsible in the first instance. Is there any instance where the remedy is only against his person, in which the demand has been proved and the party discharged?'] In *Carpenter v. Thornton* no remedy could exist against the goods. So in all equitable demands, which are clearly provable, though the only remedy in equity is in personam. Besides, a bankrupt may in several cases be entitled to be discharged under the certificate, from a demand *not* provable under the commission. *Rex v. Tacker*(a).

Lord Keeper *Henley's* decision, as stated by Lord *Eldon* in *Ex parte Todd*(b), was, that after nonsuit in ejectment, before a bankruptcy, the nonsuit was nothing, and there was no demand at law by the defendant for costs till judgment, which, being after the bankruptcy, there was not a debt at the date of the commission, and the costs of the nonsuit could not be proved. That

(a) 5 M. & S. 508. It is added in Lord *Henley's Bankrupt Law*, 3d ed. p. 413. that it may be inferred, as well from the judgments of Lord *Eldon* in *Ex parte Hill*, 11 Ves. 646; and Sir John *Leach* in *Ex parte Haynes and Poucher*, 1 Glyn & J. 386. as from several other decisions there cited, viz. *Scott v. Ambrose*, 3 M. & S. 326; *Dimsdale v. Eames*, 2 Br. & B. 8; *Holding v. Impey* 1 Bing. 189; *Ex parte Haynes*, 1 Gl. & J. 107; *Blandford v. Foote*, Cowp. 138; on the point that the costs of all proceedings in an action on *contract*, which, for want of a previous verdict, are not provable under the commission, are yet barred by the certificate, together with the original debt. The learned author, however, adds, that the cases last cited cannot be reconciled with *Walker v. Barnes*, 1 Marsh. 346; 5 Taunt. 778; and *Haswell v. Thoroughgood*, 7 B. & C. 705. In *Ex parte Haynes and Poucher*, 1 Glyn and J. 386. the Vice Chancellor (*Leach*) states, as the result of the authorities, that on bankruptcy between verdict and judgment, in an action on *contract*, the costs *de incremento* are provable, being by the verdict incorporated with the existing debt, though not ascertained in amount until the judgment: distinguishing, (says the editor of the 2d edition of *Vesey's Reports*, 11th vol. 652,) in that respect the case of a verdict in *tort*, and adopting Lord *Eldon's* conclusion, that, even in *contract*, if the verdict be after the bankruptcy, the costs are not provable; but inclining strongly to the opinion that they are in that case barred by the certificate, together with the original debt.

(b) 11 Ves. 651.

turned on their amount not being ascertained before the bankruptcy, and was acted on in *Ex parte Hill*. [Bolland B. In *Haswell v. Thorowgood*(a) a cause and all matters in difference were referred at nisi prius to an arbitrator, who found a sum of money to be due from the plaintiff, the bankrupt, to the defendant, and ordered it to be paid to the defendant accordingly. The bankruptcy happened before the costs were taxed, or judgment of nonsuit signed; and it was held that the taxed costs could not be proved under the commission, and that the bankrupt was not discharged as to that debt by his certificate. There, the costs were not completely ascertained by taxation until after the bankruptcy. Here, as the costs were taxed *before* the bankruptcy, neither that case nor sect. 58 of 6 Geo. 4. c. 16.(b) apply. In *Ex parte Eicke*(c) the bankrupt was held discharged from costs taxed before the bankruptcy, though no action could have been maintained for them. Nor is *Ex parte Stevenson*(d) an authority against the discharge of this bankrupt, for it is admitted that, in order to support a commission, a petitioning creditor's debt must be a legal debt. [Lord Lyndhurst C. B. The allocatur seems to have ascertained the amount of costs in this case. The question is of very great importance, and we will consider it.] On another day judgment was delivered as follows:—

Lord LYNDHURST C. B.—We have considered this question, and are all of opinion that the bankrupt is entitled to his discharge. We have come to this conclusion, not at all on the ground that there was an agreement between the parties. Taking all the circumstances into consideration, we think that no such agreement existed; but we think that there was an

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(a) 7 B. & Cr. 705.

(b) First made law by 6 Geo. 4. c. 16.

(c) 1 Glyn & J. 261.

(d) 1 Mont. & M. 262.

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The assignment of the *October* previous, which was proved, made out a complete title in the plaintiff, and it was not sought to show that the reversion was taken out of him. The court then called on

Lloyd and *Welsby* to support the rule. The fact of the existence of a second conveyance appeared on cross-examination as to the consideration of the first. It also then appeared that that second conveyance was in court, and the refusal to produce it, on the ground of its being one of the plaintiff's title-deeds, made secondary evidence of it inadmissible. [Lord *Lyndhurst* C. B. The plaintiff's attorney could not be asked as to the contents of his client's deed, for he had no right to give evidence upon the subject. Had the defendant any witnesses of his own in court to prove those contents? *Alderson* B. If no witness was tendered by you, no real question could be raised.] It does not appear necessary that on a question of the admissibility of proposed evidence tendered, its particular nature should be stated. No such question was asked as to the parol evidence offered in *Edwards v. Buchanan* (a). [Lord *Lyndhurst* C. B. I am not satisfied that there was evidence that the second deed related to the demised premises. The plaintiff's attorney put in a deed which established the plaintiff's title. He then admitted he had in court another deed belonging to the plaintiff relating to the same property; but how could that appear? The plaintiff was not bound to produce that deed.] Secondary evidence of its contents was therefore admissible, though no notice to produce it was proved. *Roe v. Harvey* (b) applies, where Lord *Mans-*

(a) 3 Bar. & Adol. 788.

(b) 4 Burr. 2484; *Yates* J. differed from Lord *Mansfield* and the rest of the court, saying, that the fact of the conveyance coming out on cross-examination could make no difference, the plaintiff's counsel were not

field principally laid stress on the plaintiff's refusal to produce a conveyance which was in court, and said, the

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obliged to produce the deed, for no man could be obliged to produce evidence against himself. The only consequence of a notice to produce would have been, the admission of inferior evidence. And *Willas J.* said, "parol evidence could not be given by the party who had the deed in his power and refused it, though it might by the adverse party. It is reasonable that if one party is in possession of a deed, and refuses (*after proper notice*) to produce it, the other side should be admitted to prove the contents by inferior evidence."

Mr. Phillips, after stating *Roe v. Harvey* in his *Law of Evidence*, (vol. i. 427, 6th edit.) says, "Upon this case it may be observed, that the fact of *Haldane* (one of the lessors of the plaintiff) having conveyed away all her interest to *Urry*, (*Thomas Urry*, another lessor of the plaintiff on a several demise,) seems to have been assumed as satisfactorily proved; but from the opinion of *Mr. Justice Yates*, which seems the better opinion, it may be collected that there was no legal proof of any conveyance of title out of *Haldane*, and that the answer of the witness, (*viz.* that *Mrs. H.* had, before the day of the demises in the ejectment, conveyed away her interest in the premises to *Mr. Thomas Urry*, i. e. the other lessor of the plaintiff, and that the deed was in court,) was as inadmissible in evidence on the cross-examination as it would have been on the examination in chief." He adds, "the true objection to such evidence is, that the witness was speaking to the contents of a deed, when there had been no notice given to produce the original, and it does not appear to be a sufficient answer to say that the deed is in court; for if the party had received a regular notice to produce it, he might come prepared with evidence to repel any inference which the production of the deed might have raised against him."

Mr. Phillips also cites *Doe d. Wartney v. Grey*, 1 Stark. N. P. C. 283; where the notice to produce having been served too late before the trial, it was attempted to enforce the production of the required lease, by stating the admission of the defendant's attorney that morning in the hall, that he had it with him. But *Scarlett*, for the defendant, objected, citing *Exall v. Partridge*, where witness having admitted he had a lease in his pocket, Lord *Kenyon* ruled that he need not produce it, and that it was incumbent on the other side to give notice in time, in order to give an opportunity of producing the attesting witness; and Lord *Ellenborough* held the evidence inadmissible, the defendant not having received proper notice; and see *Cook v. Hearn*, *Moody & Rob.* 201; *Bevan v. Water, M. & Malk.* 235.

Mr. Starkie, in his work on Evidence, Vol. I. 2d edit. 350, n. after citing *Doe v. Grey* and *Roe v. Harvey*, observes on the latter, "It would probably now be held that the evidence was sufficient, since it seems to be clear that the statement on cross-examination was not admissible in evidence to prove

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want of notice was no objection, because they had the deed in court. There was parol evidence enough in the cause to show that the title was varied by the original deed. [Lord *Lyndhurst* C. B. If that evidence was properly received, it gave the defendant a right to address the jury on the presumption arising against the plaintiff from his withholding the deed, and if they thought that fact affected the plaintiff's case, they might have given the defendant a verdict. Lord *Mansfield* says, in *Roe v. Harvey*, that in a civil case the refusal by parties after proper notice to produce evidence which may prove against themselves, will be left by a court as a strong presumption to the jury (a).] The learned baron having delivered his opinion on the evidence, it seemed most fit not to address the jury. It might, however, be assumed from the other facts, that the second deed altered the whole title. [*Alderson* B. In *Roe v. Harvey* there were several demises by Mrs. *Haldane* and *Thomas Urry*; the evidence proffered was a conveyance by the former to the latter, then it was reasonable that parol evidence should be admitted of that conveyance; the title was proved to be in *Urry*. Yet the court upheld a nonsuit, which in fact affirmed that there was title in neither. It is a strange decision. Lord *Lyndhurst* C. B. All that can be taken at the utmost to be decided by *Roe v. Harvey* is, that the non-production of a deed by the owner or party in a cause when called on, is a subject of strong a conveyance; and, consequently, that the title under the will remained undisturbed."

(a) But if a witness declines to answer a question, the answer to which in the affirmative would tend to expose him to prosecution, no inference can be made that the witness admits the facts inquired into, *Roe v. Blakemore*, Moody & M. 384; and see the opinions of *Holroyd J.* in *Rex v. Watson*, 2 Stark. N. P. C. 158; Lord *Eldon* in *Lloyd v. Passingham*, 16 Ves. 64, all cited in the reporter's note there, which adduces reasons to the contrary.

remark to a jury.] Mr. *Phillipps*, in his *Law of Evidence*, doubts the authority of that case, not on the ground put by *Yates J.* who dissented, but on the mere ground that no notice to produce was there shown (a). However, the objection here is, that the witness proved the title to be in the plaintiff in a manner not stated in the declaration. [*Gurney B.* In *Cook v. Hearn* (b), Mr. Justice *Patteson* held, that the attorney for the defendant could not be asked by the plaintiff's counsel whether he had with him a rule for payment of money into court, no timely notice to produce having been given, and that decision was assented to in *banc* in King's Bench on a rule nisi to enter a nonsuit.] That case does not apply, for that rule, to have effect, must have been served on the party calling for its production, and either party might have produced it. Here the defendant claims no interest under the deed in question. In *Bevan v. Waters* (c), the defendant's attorney was called on to produce a letter in his possession, the notice to produce having been served 100 miles from *London* the day before the trial. On objection that the question broke in on the rule against disclosing privileged communications, *Best C. J.* said he recollected Lord *Mansfield* had decided that an attorney was bound to answer the question, the object being to let in secondary evidence in case it was not produced. He therefore thought the question ought to be answered. In *Cocks v. Nash* (d), the defendant wished to give in evidence a deed executed by the plaintiff and various of his creditors, but not by the defendant himself. One *Hammond*, named in the deed as a co-trustee with the plaintiff, had it in court, and was willing to produce it, but the plaintiff's counsel ob-

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(a) See *ante*, note in p. 665.

(b) Moo. & Rob. C. N. P. 201.

(c) Moo. & Malk. 236.

(d) 6 C. & P. 154, S. C. not S. P. 9 Bing. 341. 723.

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jected, and *Gurney B.* admitted secondary evidence. [*Gurney B.* A notice to produce was then proved before I suffered the parol evidence to be given. The trustee had suffered the defendant's attorney to examine a copy with the deed while in his possession; that copy was the secondary evidence admitted, but its correctness was proved not by *Hammond* but the attorney.] At all events if *Harper*, as attorney for the plaintiff, need not have answered the questions which he did concerning the contents of the deed, had he objected to them on the ground of his privilege, or if secondary evidence could not be given of them for want of a notice to produce; still as it appeared from his evidence that there was a second conveyance of the demised premises to the plaintiff in a manner varying from that laid in the declaration, *Roe v. Harvey* is sufficient authority to show that the plaintiff's title, manifestly imperfect, should have been cleared up by producing the second deed. The only objection made at the trial as to privilege was, that the plaintiff's attorney was not bound to produce the second deed; but he admitted his knowledge of the contents.

Lord LYNDHURST C. B.—I am of opinion that there ought not to be a new trial in this case. The effect of the evidence, as it now stands, is, that it appeared from the plaintiff's witness, who was his attorney, that in *January 1833*, some other deed relating to the demised premises had been executed to the plaintiff by the same party who had previously executed the assignment of *October 1832*; but nothing more appears respecting the contents of the second deed; and it is quite consistent with all the proof that the second conveyance might have been a confirmation of the former. But it was contended, first, that as the second deed was in court in the possession of the plaintiff's attorney

it ought to be produced; and, secondly, that if he refused to produce it, parol evidence of its contents was admissible. But it does not appear what that other evidence which was proposed to be given by the defendant was, or that he was prepared to offer any, oral or written, as a part of his own case. Then it seems that he was reduced to giving such evidence as could be attempted to be extracted from the plaintiff's attorney. Now it is clear that such a witness could not be called on or permitted to give parol evidence of a deed material to his client's title, even if willing to do so (a).

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BOLLAND B. concurred.

ALDERSON B.—Suppose it to have been necessary to plead specially the facts now relied on by defendant, it must have been alleged that another deed between the same parties, relating to the same premises, and of a subsequent date, had been executed. But could that, without giving any further description of its contents, have afforded any answer? Then if it would be no defence on the record, it could be none if given in evidence without more at nisi prius. It is quite clear that the attorney could not be called on to state the contents of his client's title-deed. I have already stated my sentiments as to *Roe v. Harvey*.

GURNEY B.—I am of opinion that very dangerous consequences would ensue if it were held that secondary evidence might be given under these circumstances. A notice to produce the deed was equally necessary, whether it was in court or not. The contents of the deed were not here in evidence, for Mr. *Harper* could

(a) See 1 Stark. on Evidence, 2d edit. p. 70.

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not prove them, whereas in *Roe v. Harvey* the witness proved that the deed there relied on was an assignment.

Rule discharged.

See *Marston v. Downes*, 6 C. & P. 381. as to proof of contents of mortgage deed in possession of mortgagee.

### NEALE *against* MACKENZIE.

Where by any statute made before 3 and 4 Will. 4. c. 42. a defendant had a right to give special matter in evidence under the general issue, that right is reserved to him by section 1. of the last-mentioned act; but since *Reg. Gen. Hil. 4 Will. 4.* he cannot plead the general issue, and also a special plea of justification.

**TRESPASS** for breaking and entering the plaintiff's dwelling-house, and seizing and detaining his goods.

A rule had been obtained to plead several matters, *viz.*, *not guilty*, and a justification for entering the house as landlord to seize the goods on a distress for rent in arrear (a).

*Comyn* showed cause. By 11 *Geo. 2. c. 19. s. 21.*, the defendant being the plaintiff's landlord and now sued for entry on the premises charged with the rent, could give every special matter in evidence under the general issue. That power is reserved entire by 3 and 4 *Will. 4. c. 42. s. 1.* Again, by the new *Reg. Gen. Hil. 4 Will. 4. No. 5.* [p. viii. ix. and x. in this Vol.] pleas founded on one and the same principal matter, but varied in statement, description or circumstances *only*, are not to be allowed. Then both pleas cannot be pleaded. [*Alderson B.* He may give more than the special matter in evidence, so the word *only* is not satisfied. Lord *Lyndhurst C. B.* As the plea of *not guilty* comprehends more than the special plea, the

(a) The general importance of this application since the new rules had induced *Gurney B.* to refuse to make any order on summons before him.

defendant may have some other matter of defence under the former which is not covered by the latter.]

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*Cleasby* in support of the rule. The defendant seeks to plead specially, in order to put the plaintiff to traverse facts stated in the plea. Before the new rules he might by the general issue deny the trespasses and justify them by a special plea. [Lord *Lyndhurst* C. B. Only by leave of the court to plead several matters.] The defendant is not compelled to plead the general issue reserved to him by the statute, but here seeks to use it to a certain extent only, *e. g.* to deny the trespass &c., and all matters except those which he proposes to justify by his special plea, *e. g.* entry to demand rent, or for the purpose of distraining. Nothing in the new rules has altered this defendant's former right to narrow his proof by special pleading. The very object of the new rules is to bring to the notice of the parties before trial the disputed facts material to the merits of the case, but if he is confined to the general issue he must go to trial prepared to prove every thing.

LORD *LYNDHURST* C. B.—The defendant must make his election. If he pleads the general issue not guilty reserved him by the statute, he must take it with all its advantages and inconveniences. This inconvenience arises from the act 3 and 4 *Will.* 4. c. 42. s. 1., by which the judges were restrained from extending the new rules to be made under the authority of that act to cases in which the right of pleading the general issue and giving the special matter in evidence had been given to defendants by statute. Nor before the new rules was the defendant entitled to plead double in the manner stated, as of course; for the leave of the court was necessary under 4 and 5 *Ann.* c. 16., and they might limit the defendant to one plea.

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ALDERSON B.—This defendant has a right to plead the general issue and to give special matter in evidence, notwithstanding the new rules; but the court will not give him leave to plead several matters. He must plead them specially.

Rule discharged without costs, the defendant to elect his plea within 24 hours (a).

(a) The defendant afterwards pleaded not guilty as to the force and arms and whatever was against the peace, and specially to the rest. This was the course adopted in the old pleadings before 4 Ann. c. 16., *Greene v. Jones*, 1 Saund. 296; and has since prevailed when leave to plead double could not be obtained, *e.g.* in courts not of record, as county courts, and when it was sought to prevent the plaintiff from replying at the trial by throwing no necessity of proof on him in the first instance, so as to give the defendant the right to begin; for being originally only pleaded to save the fine to the king, (per Bayley J. and Wood B., *Jackson v. Hesketh*, 2 Stark. N. P. C. 518,) it was held not to be a general issue throwing the necessity of any proof on the plaintiff. Per Bayley J. *Hodges v. Holder*, 3 Camp. 366.

As to the right to begin, the judges have resolved that the plaintiff shall begin in *all actions for personal injuries, and also in slander and libel*, notwithstanding the general issue may not be pleaded, and the affirmative be on the defendant, per Tindal C. J. in *Carter v. Jones*, 6 C. & P. 64. tried in C. P. 6 July 1833. *Burrell v. Nicholson*, K. B. December 9th, 1833; 6 C. & P. 124. was trespass, with a first count for breaking into plaintiff's house, and taking and detaining his goods, and a second for taking the goods. Plea: a justification stating plaintiff's house to be within and parcel of the parish of St. M., and justifying the "taking the goods" as a distress for poor-rates assessed on plaintiff in respect of his house as being in the parish of St. M. Replication: that the house was not within &c. St. M. The plaintiff claimed to begin, stating the action to be for taking the plaintiff's goods, but that as defendant was a constable, plaintiff must prove a demand of a copy of the warrant, whatever might be the issue to be tried. On defendant's admitting that demand, Denman C. J. held him entitled to begin, and the court of K. B. affirmed that decision in the next *Hilary* term.

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CLARKE and Wife *against* WEBB and Another.

**A**SSUMPSIT for use and occupation, with counts for money had and received, and on an account stated. Plea: general issue. At the trial before Lord *Lyndhurst* C. B., at the last *Lent* assizes for *Surrey*, it appeared that one *Lawrence* being tenant of a house of the plaintiffs, owed them 7*l.* for a quarter's rent due 25 *March* 1833, and filed his schedule in the insolvent court in *June*. On the 18th the plaintiffs distrained for that quarter's rent on all *Lawrence's* fixtures and a part of his furniture, and he was discharged in *July*, having procured it to be paid. The defendants having been appointed his assignees, afterwards removed some fixtures of his from the premises and sold them (a). No occupation by the assignees appeared, but it was shown that they had promised to pay the plaintiffs the quarter's rent due from the insolvent on 24 *June* 1833, in order to get possession before selling the fixtures. The jury found a verdict for the plaintiffs, damages 7*l.*; thus affirming the agreement, subject to leave to move to enter a nonsuit.

A landlord being in possession of the premises lately held by his insolvent tenant, in which were fixtures belonging to the latter, agreed to give up possession on his assignees paying 7*l.* for the then rent due. They entered and sold the fixtures, but no occupation by them was proved. Held, that the 7*l.* could not be recovered on the count on an account stated, the defendants' agreement to pay that sum not being bottomed on any previous transactions between the parties.

*Thesiger* obtained a rule accordingly, on the ground that there was no count on which the plaintiff could recover on the evidence given, *Naish v. Tatlock* (b).

*Platt* showed cause. It is not necessary to declare specially on an agreement not under seal stipulating for pecuniary recompence, and which has been per-

(a) Where the lessee may himself remove fixtures, they may be taken under a fi. fa. against him. Per Lord *Lyndhurst* C. B., in *Troppe v. Harter*, ante, Vol. III. 619. Per *Bayley* J., *Place v. Fagg*, 4 Mann. & R. 277; *Winn v. Ingilby*, 5 B. & Ald. 625; *Pitt v. Shew*, 4 B. & Ald. 206; *Evans v. Roberts*, 5 B. & Cr. 841.

(b) 2 H. Bla. 319.

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formed by the plaintiff, and indebitatus assumpsit lies on the defendant's obligation to pay a specific sum arising out of the performance of the special contract. The second quarter's rent had become due and the subsequent agreement was to pay it, so that the money was due, and might be recovered under the account stated, without proving use and occupation under 11 G. 2. c. 19.

Lord LYNTHURST C. B.—No use and occupation by the defendants was proved. The agreement was this; the plaintiffs agreed to give up the key of the premises to the defendants, in consideration of which, they agreed to pay 7*l.*, the second quarter's rent, for which they were not liable. That was a distinct and separate contract by the defendants to pay a sum of money. Then how can that be converted into a claim available on a count for an account stated? That count implies some previous transaction between the parties with reference to which the account relied on was stated between them. The possession was given to the assignees, not with a view to their retaining it, but to get possession of the fixtures, which they accordingly got and converted.

The other barons concurred.

Rule absolute.

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RUSH *against* SMYTH.

**T**RESPASS against the sheriff of *Suffolk*, for seizing and leading away two horses of the plaintiff. Plea: not guilty. The cause was tried before *Vaughan B.* at the *Suffolk Lent* assizes. The officer who had seized the goods under a *fi. fa.* was called for the plaintiff to produce the warrant under a subpoena duces tecum, and being so called, was by mistake sworn, and asked by the plaintiff's counsel, were you employed as bailiff, and had you any warrant? However, no answer was made. *Storks Serjt.*, for defendant, claimed a right to cross-examine the witness as he had been sworn, but the learned baron refused to recognize that right, as the witness had not given any testimony. He was afterwards called for the defendant, but the verdict was for the plaintiff.

A rule for a new trial having been obtained in *Easter* term, on the ground that he should have been permitted to cross-examine the witness,

*Austin* was to have showed cause, but the *Court* called on

*Storks* and *B. Andrews* to support the rule. In *Simpson v. Smith(a)*, Mr. Justice *Holroyd* held that a witness, a magistrate, being merely called to produce an information in his possession, could not be cross-examined, though sworn, no question having been asked him; but here the witness was sworn, and a pertinent question was asked him. Though no reply was given, that could not affect the defendant's right to

A witness called to produce a document pursuant to a subpoena duces tecum, was sworn as a witness by mistake, and a question was asked him, but he did not answer it. Upon this the learned judge refused to suffer him to be cross-examined by the opposite party, who afterwards called him as his own witness: Held, that this course having laid the whole evidence before the jury, the court would not disturb the verdict.

*Quere*, if the evidence had not been thus given in chief, whether the witness, having been sworn and asked a question, without giving an answer, was liable to cross-examination by the opposite party.

See the

(a) 1 Phill. on Evid. 260; 1 Stark. on Evid. 2d edit. 161.

general rule, that he need not have been sworn as a witness, *Summers v. Moseley*, ante, 158.

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cross-examine a witness produced by the plaintiff, whose silence in answer to the question propounded to him on the plaintiff's behalf was matter for the jury. Besides, in *Phillips v. Eamer and Another*, sheriff of *Middlesex*(a), a witness having been put into the box and sworn, yet though he was not examined in chief, Lord *Kenyon* held, that having been called he should be examined. Then it is sufficient that the learned judge prevented the witness from being cross-examined.

ALDERSON B.—The objection was waived by the witness being called for the defence, so that as the whole evidence in the cause has been in fact laid before the jury, though not in the order contended for by the plaintiff's counsel, the verdict ought not to be disturbed. I do not say what I should have decided had the point arisen before me. The rule is now clearly settled in all the courts, that when a party calls a witness upon a subpœna duces tecum, to produce the documents required by that writ, which he produces or not at his peril; if he produces them, and they can be identified by other witnesses, without examining him, he is not open to cross-examination. In a case which lately occurred before me at *Carlisle*, I ruled accordingly. The clerk of a public company was there called on his subpœna duces tecum to produce the books of the company. I held that he must produce them at the peril of attachment by the court who issued the writ. He then produced them, and they were identified by another witness, but I refused to suffer him to be cross-examined, and the Court of King's Bench refused a rule for a new trial. Here the witness was only called to produce the warrants.

(a) 1 Esp. N. P. C. 357; and see per Lord Hardwicke in *Vaillant v. Dodemede*, 2 Atk. 524.

GURNEY B.—A new trial, if granted, would only take place under the same circumstances as the former, for it is not pretended that there is any other evidence to be laid before the jury, the witness having been examined.

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Rule discharged (a).

(a) See *Summers v. Maseley*, ante, 158, reported since this case was argued.

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COLBURN *against* PATMORE.

CASE. The declaration stated, that the defendant, before and at the time of committing of the grievance by him the said defendant, as hereinafter mentioned, had been and was retained and employed by the said plaintiff to take upon himself the various duties of editing a certain publication, to wit, a publication called *The Court Journal, or Gazette of the Fashionable World*, then the entire property of the said plaintiff, and whereof he the said plaintiff was then and there the proprietor, and to devote all his time and attention to the same, save and except the hours he had then already engaged to devote to the superintendence of *The County Press*, and which hours were not to be increased beyond those then required on the *Saturday* and malicious libel &c. It then proceeded to state that an information was afterwards exhibited against plaintiff for "falsely and maliciously printing and publishing" the said libel; and that such proceedings were thereupon had that plaintiff was convicted of the offence and fined 100*l*. The plaintiff had a verdict for the fine and costs. However, judgment was arrested, on the ground that upon the declaration the injury sought to be compensated did not appear necessarily consequent on the breach of duty charged against the defendant, for the act of printing and publishing by the plaintiff did not appear to be the same as that of inserting and publishing by the defendant.

*Semble*: The proprietor of a newspaper in which, without his knowledge or consent, a libel is inserted by his editor, cannot recover against him the damages sustained by his own conviction as proprietor.

The declaration stated that defendant had been retained by the plaintiff to edit the plaintiff's newspaper for reward, and that he did not edit it in a proper manner, but without the knowledge, leave, authority, or consent of the plaintiff, falsely, maliciously, and negligently "inserted and published" therein a false

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and *Monday* in each week, so that they should not interfere with the time and attention necessary to be given to the said *Court Journal*, and to undertake the literary management of the said *Court Journal*; and to prepare for the press all articles and matters belonging thereto, to the best of his ability and to the satisfaction of the said plaintiff; to write on the average one original article weekly; also the reviews and articles of fashion, music, literature, the drama, fine arts, digest of political events; to select from other journals all that might be found suitable for the pages of *The Court Journal*, and generally to contribute to the utmost of his power to the interest and success of the said journal, for reward to the defendant in that behalf. And it was stipulated that political controversy and party politics should form no part of the said journal, without the consent of the said plaintiff; and that the most perfect impartiality should be adopted in the literary and critical departments. And the defendant had then and there accepted such retainer and employment, and under and by virtue thereof, at the time of the committing of the grievance hereinafter next mentioned, had taken upon himself the various duties aforesaid, and then and there was the editor of the said publication called *The Court Journal*. Yet the said defendant, disregarding his duty in that behalf, and contriving and wilfully intending to injure and aggrieve the said plaintiff in this behalf, did not perform or discharge the various duties of editing the said publication called *The Court Journal* in a due and proper manner, but on the contrary thereof, heretofore, to wit, on the 28 day of *January* 1832, in the county aforesaid, without the knowledge, leave, authority, or consent of the said plaintiff, falsely, maliciously, and *negligently* (a), in-

(a) Added to the declaration on summons to amend; see *Tattnall's case*, mentioned by Heath J. in *Bush v. Steinman*, 1 Bos. & Pul. 409; *Rex v. Gutch and others*, Moo. & Mal. 433.

serted and published, and caused to be inserted and published in the said publication, called *The Court Journal*, the false, scandalous, malicious, libellous, and defamatory matter following of and concerning [here followed the libel on a lady of high rank], contrary to his duty as such editor as aforesaid, and to the duties which he had been retained to perform as aforesaid, and in breach and violation thereof. And the said plaintiff further saith, that an information was afterwards, to wit, in *Easter* term, in the second year of the reign of our said lord the king, filed in the court of our said lord the king, before the king himself, by *E. H. Lushington* esquire, coroner and attorney of our said lord the king, in the court of our said lord the king, before the king himself, who prosecuted for our said lord the king in that behalf against the said plaintiff; and one *T. H.*, one *T. S.*, and one *Mr. T.* for the falsely and maliciously printing and publishing of the said libel; and that such proceedings were thereupon had in the same court, that it was then and there considered and adjudged by the said court, that the said plaintiff should be convicted of the said offence, and that he should pay a fine to our said lord the king of 100*l.* for that offence, and that he should be committed to the custody of the marshal of the marshalsea of the said court of our said lord the king, before the king himself, until he should have paid the said fine; by means and in consequence whereof the said plaintiff was then and there forced and obliged to pay, and did then and there pay the said fine, and also by means and in consequence of the premises, the said plaintiff was forced and obliged to pay and become liable to pay certain costs and expenses to a large amount, to wit, to the amount of 100*l.* in and about his defence in the said prosecution, and in and about endeavouring to mitigate the sen-

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tence of the said court upon him for the said offence. And the said plaintiff further saith, that he was so prosecuted as aforesaid by reason and in consequence of the committing of the said grievances by the said defendant as aforesaid; and that by reason and in consequence of the premises the said plaintiff hath been otherwise greatly injured and damaged, to wit &c. The second count was similar, without charging that plaintiff was prosecuted by reason of the committing the grievances by the defendant. Plea: general issue.

*Follett and Cowling* showed cause. The question is, whether the proprietor of a newspaper, who having been prosecuted by criminal information, for a libel inserted in it by his editor without his knowledge, is convicted and fined, can recover against him the expenses incurred by his misfeasance? The plaintiff's ignorance of the culpable insertion is stated in the declaration, and was never doubted, or this action could not have been maintained. [*Alderson* B. Was not the plaintiff actually ignorant, but legally cognizant and liable?] Proprietors of newspapers have been held liable for libels inserted by their servants to edit, though they were themselves resident at a distance, and confessedly ignorant of the act complained of (a). Those decisions do not proceed on any presumption of the master's cognizance of the contents of their papers, for that might be rebutted by evidence to the contrary; but on the broad ground of public policy, that by holding masters liable for the acts of their servants, they may be driven to employ trustworthy persons. If it is said that this is not a negligent, but a wilful act of the servant, for which the master is not liable, those decisions apply to show the con-

(a) *Rex v. Gutch*, M. & M. 433.

trary in the case of the proprietor of a newspaper. [*Alderson* B. That is because the law presumes he knows the fact.] If that presumption arises, notwithstanding proof to the contrary, the result is the same. The law should presume him cognizant so as to enforce his remedy over against the person who exposed him to the consequences of that legal presumption. [*Alderson* B. If the law presumes a proprietor of a paper to be cognizant of the acts of his servants, and holds him liable accordingly in criminal proceedings, can he sue a co-trespasser for contribution?] The rule by which such proprietors are so held liable is not founded on that presumption, for that would be open to rebutter by proving the fact of the master's ignorance. It rests on a different principle, *vis.* that in his capacity as such proprietor he takes on himself the task of preventing the insertion of libellous matter in his publication, under the penalty that if he does not, he shall be criminally responsible, whether cognizant of the offence or not. Then being actually ignorant of the act of his servant, though liable in law to pay for it as his own, he claims to recover from him the amount of loss occasioned him by it. It would be sufficient to prove that the defendant "negligently" caused the insertion of the libel (a); and it is a clear rule that where damage is occasioned to one man by the negligent act of another, an action on the case will lie for it. Chief Baron *Comyns* in his *Digest*, tit. *Action on the Case* (A), collects cases which show that no one can sustain injury from the wrongful act of another, without having a remedy over against him by action. Then, if a master who is civilly liable for the act of his servant in negligently driving his carriage in his absence, can sue the latter for the pecuniary loss sustained by him in consequence of such his act, there is no reason why, because

(a) See Chitty on Pleading, 4th edit. 335.

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in this peculiar case the master is criminally as well as civilly responsible for the negligent act of his servant, he may not equally sue him for the expenses occasioned by a criminal prosecution for that act. There can be no difference between the loss incurred by the costs and fine in a criminal information and the damages and costs in an action. Can it be doubted, that had the civil remedy been taken against the plaintiff, the damages and costs might have been recovered by him in this mode against this defendant? [Lord *Lyndhurst* C. B. There is this distinction between the present case and others where the acts of servants render their masters liable; that even if a libel be published wilfully by the servant, the master is civilly as well as criminally amenable, though in other cases he is only liable for his negligent or unskilful act(a). It is an anomaly in this particular case. *Alderson* B. The difficulty is, that a master is presumed to authorize the publication of a libel by his servant, whereas in other cases of torts by a servant he is not.] Taking the master as amenable, whether the act be wilful or not, or known to him or not, and that he suffers damages in consequence, why, if he proves that he did not know it, is he not to maintain an action against his servant, as he would in a case where he does know it? [*Alderson* B. The proprietor of a paper is a master giving general authority to publish every thing; libellous or the contrary. Then is he not criminally responsible for giving that authority?] Taking the presumption of law to be that the servant has a general authority to publish, still no authority from him to do the illegal act of publishing a libel can be presumed, it must be expressly proved; for an authority to publish a newspaper does not necessarily imply authority to publish libels in it. The hardship would be extreme if a pro-

(a) *Macmanus v. Crickett*, 1 East, 106, &c.

prietor of a paper should be held not only responsible for the criminal act of his servant, but also to have no remedy over against the party really guilty. It may be said, that if both master and servant were sued together jointly, neither could sue the other, being both tort-feazors; but the fact admitted on this record is, that the libel was inserted without the knowledge and consent of the plaintiff. Then the plaintiff is not a tort-feazor, and sues for indemnity not for contribution. The law may for its own objects regard them both as guilty, for the purposes of civil or criminal proceedings by parties injured, but not inter se, so as to prevent reparation to the innocent party from the party really guilty. In *Adamson v. Jarvis* (a) an auctioneer who had been employed to sell goods by a person who had no right to dispose of them, was sued alone by the real owner, who recovered the value against him. Thereupon, though the action of tort might have been joint against the employer and auctioneer, who were both tort-feazors in legal contemplation, it was held that the auctioneer having sustained the loss might recover against his principal. The reason why one tort-feazor cannot sue the other is, that both are equally guilty. [*Alderson* B. Alike guilty.] Now the plaintiff's guilt in any sense but that imposed ex necessitate by the law quoad alios, is here negatived. In the last case, *Best* C. J. says, "From the inclination of the court in *Philips v. Biggs* (b), and from the concluding part of Lord *Kenyon's* judgment in *Merryweather v. Nixon* (c), and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. If a man buys the goods of another from a person who has no authority to sell

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(a) 4 Bing. 66.

(b) *Hardres*, 164.

(c) 8 T. R. 186.

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them, he is a wrong-doer to the person whose goods he takes, yet he may recover compensation against the person who sold the goods to him. Suppose a master to be convicted in penalties under the smuggling or revenue laws, and penalties to be inflicted on him for the wrongful act of his servant, cannot he recover over against that servant? [Lord *Lyndhurst* C. B. The nearest case would be that of a master carrying on a business subject to the supervision of the excise laws, whose servant does some act to violate them without his knowledge, so as to subject him to penalties (a). When the relative situation of the parties is considered, it is not by any means conclusive against your argument that no instances of such actions can be produced (b).] In *Humphrys v. Pratt* (c), a sheriff trusting to a plaintiff's representation had seized cattle under a fi. fa. as belonging to defendant: damages being afterwards recovered by the real owner against the sheriff, he sued the original plaintiff in case to recover the damages and costs incurred in consequence of his misrepresentation, without averring fraud in the representation or knowledge of its falsehood, and obtained judgment in the *Irish* courts of Exchequer and Exchequer Chamber; which was affirmed on appeal to the House of Lords (d). In that case both the creditor and the sheriff were joint tort-feazors as against the owner of the cattle. But it

(a) See *Attorney-General v. Riddell*, ante, Vol. II. 523.

(b) In *Nixon v. Bronan*, 10 Mod. 109, 4 Bac. Abr. 589, Gwill. ed., 6th edit., the court, after holding a master liable for a loss occasioned by his servant's disobedience of his orders, were of opinion that the master could not recover it of the servant, the loss being occasioned by a mere accident, and not by either folly or negligence. See also *Langdon v. African Company*, Prec. Chanc. 221. Trin. 1703; 15 Vin. 316.

(c) Dom. Proc. 5 Bligh's R. 154; 2 Dow & Clark, 218.

(d) Per Lords *Tenterden* and *Wynford*. The former afterwards said in K. B. that the decision turned on the sheriff being a public officer liable to an action if he refused to act.—Clark's MS.

appears on this record that the defendant is in fact the real offender, and it is by an anomaly only that the plaintiff is convicted of the offence. The plaintiff does not seek to recover contribution but indemnity, a distinction taken by Lord *Kenyon* in *Merryweather v. Nixon*, where the plaintiff sued for contribution, admitting himself to be equally guilty of the tort with the defendant. Had the defendant agreed to indemnify the plaintiff for all damages he might incur by the inserting any libel in the paper, it might have been enforced, or bonds to guarantee the good behaviour of clerks or sheriffs' officers would be invalid instruments.

*Maule* for the defendant. This is an action in which the plaintiff seeks to exonerate himself from the consequences of a conviction for an offence. He assumes that it appears from the declaration, that he neither knew of or consented to the commission of the offence. But it is consistent with both the counts that he committed the offence himself, and there is no averment that he did not. The declaration states, that the defendant "without the knowledge, leave, authority, or consent of the plaintiff, falsely, maliciously and negligently inserted" the libel in *The Court Journal*, and that an information was afterwards filed in the King's Bench against the plaintiff, for "the falsely and maliciously printing and publishing of the said libel," and that the plaintiff was convicted "of the said offence." That offence is stated to have been the "falsely and maliciously printing and publishing the said libel," not the defendant's act of inserting the libel in *The Court Journal*. Then what is there on this record to show, as has been argued, that the plaintiff was innocent in every sense except that of the rigorous rule of law? Nothing identifies the false and malicious publication of which the plaintiff states himself to have been convicted, with the

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"false, malicious and negligent publication" in *The Court Journal*, charged by him to have been done by the defendant. The two acts stated, of "inserting and publishing" by the defendant, and "printing and publishing" by the plaintiff, are perfectly distinct. Both parties may have singly published the same libel at different times, for it is not averred to be one act. Then the judgment of the court of King's Bench, set out in the declaration, that the plaintiff did falsely and maliciously publish the libel, must be taken to be conclusively true, and not to be contradicted by averment. In point of fact, the averment of the plaintiff's innocence only extends to the act charged on the defendant in this declaration, not to that of which the plaintiff himself was convicted. [Lord Lyndhurst C. B. There is no averment that the plaintiff was ignorant of the libel being published. Then, consistently with this declaration, the libel might have been originally "inserted" by the defendant as editor, and afterwards sold by the plaintiff at his shop. Alderson B. It would come to the same thing as the sale of a book or paper by a party ignorant of its contents. Is there any precedent of a bookseller prosecuted for publishing a libel having sued the publisher? There is, however, an averment which may tend to connect the act of the defendant with that of the plaintiff, viz. "that the plaintiff was so prosecuted as aforesaid, by reason and in consequence of the committing the grievances by the defendant as aforesaid."] That publication of which the plaintiff has been convicted by a competent tribunal, may have taken place by him in consequence of the insertion by the defendant. No such averment appears in the second count.

The main question is, can a party convicted of a public wrong, for which criminal proceedings might be had, claim indemnity for the results to himself from another who has joined with him in committing it. The

difficulty arises from the gratuitous assumption that the offence of publishing a libel in a newspaper, stands on a different footing from other acts to which the law has affixed the penalties of crime. [Lord *Lyndhurst* C. B. Suppose damages in a civil suit had been recovered against the plaintiff for publishing this libel.] The same defence would have been open. Whatever may be the nature of the particular act, held by law to be a crime, the same consequences must follow. Then, if by law a proprietor of a newspaper may be morally innocent, and yet criminally responsible, in point of law, for the publishing a libel in it, whether he knows of its insertion or not, he must be treated as an offender to all intents and purposes.

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LORD *LYNDHURST* C. B.—The declaration shows, that the first act relating to the libel in question, was that done by the defendant, viz. the “inserting and publishing” it in *The Court Journal*. The charge of insertion would have been satisfied by proof of his putting the matter into writing, and handing it to the printer. This act of the defendant appears from the declaration to have been followed up by this additional act of the plaintiff, viz. printing and publishing what had been thus previously prepared by the defendant. And it is quite consistent with the allegations on the record, that the latter act might be distinct from the former. The plaintiff may have chosen to adopt an article furnished him by the defendant. He has been convicted of maliciously publishing the libel, nor does any thing appear to show him not practically and in fact a participator in that transaction. The averment, that the defendant inserted and published the libel without the plaintiff’s knowledge or consent, may be true, and yet the plaintiff may have been so pleased with it, as to have suffered it to be printed, or may have published it again on a subsequent occasion.

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The important general question on the merits does not, therefore, arise. I am not aware of any case, in which a man duly convicted of an act declared by law to be criminal, and punished for it accordingly, has been suffered to maintain an action against the party who participated with him in the offence, in order to procure indemnity for the damages occasioned and sustained to him by that conviction. But after hearing the arguments, I entertain little or no doubt that such an action could not be maintained.

BOLLAND B.—I agree with the court in their decision. It has become unnecessary to decide upon the main question.

ALDERSON B.—The declaration states, first, a duty on the part of the defendant, and then a breach of it by him in not properly performing his duties of editor. It should then have gone on to show an injury sustained by the present plaintiff, in consequence of the defendant's breach of duty previously alleged. This he has not done, for the injury as laid appears to have been sustained from his own wilful and separate act, in printing and publishing the libel in his newspaper. Upon the general question I agree in the view taken of it by my lord chief baron.

GURNEY B.—The plaintiff cannot have judgment on this record. On the other question I strongly concur with the opinion already expressed.

Rule absolute for arresting the judgment (a).

(a) Where both parties are equally criminal against the general laws of public policy, the rule is *potior est conditio defendentis*: per Lord Mansfield *C. J. Smith v. Bromley*, Dougl. 697; relied on by *Lawrence J.* in *Horson v. Hancock*, 8 T. R. 578; see Cowp. 343; 7 T. R. 535; 1 East, 96, 99.

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WOODWARD *against* COTTON.

**D**EBT on 5 *Geo. 4. c. cxxv. s. 97.* The first count of the declaration stated, that the defendant did narrow a certain ditch situate &c., and not within the limits of the jurisdiction of any commissioners of sewers, without the consent or approbation of the trustees mentioned in a certain act of parliament made in the 5th year of his late majesty king *Geo. 4.*, intituled, "An act to repeal several acts for the relief and employment of the poor of the parish of *St. Mary Islington*, in the county of *Middlesex*, for lighting, watching, and preventing nuisances and annoyances therein; for amending the road from *Highgate* through *Maiden Lane*, and several other roads in the said parish" &c. &c., in writing first had and obtained, contrary to the form of the statute in such case made and provided, whereby and by force of the statute the said defendant for his said offence forfeited the sum of 50*l.*, and thereby and by force of the same statute an action hath accrued &c.

Other counts varied the statement of the nature of the ditch or watercourse and the offence; one set alleging it to have been committed contrary to the terms and stipulations, and in other manner than had been expressed in a certain consent or approbation in writing had and obtained by the defendant from the trustees mentioned in the said act, in this, to wit, that the said consent and approbation so given and granted by the said trustees expressed that the said last-mentioned ditch to be arched over by the defendant was not to be less than 13 feet superficial. Plea: nil debet.

The section in point enacted, "That it shall and may be lawful for the said trustees from time to time, as they

By 5 *Geo. 4. c. cxxv.* (a local act,) no drain within a certain district described by the act was to be arched over by "any person whatsoever" without the consent of certain trustees. A surveyor who was employed by a private individual to superintend the erecting and arching over of a drain on his property within that district is a "person" within the act.

By the concluding section it was enacted, that the act should be deemed and taken to be a public act, and should be judicially taken notice of as such without being specially pleaded: Held, that a printed copy was admissible in evidence without proof that it had been examined with the parliament roll, or printed by the king's printer.

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shall see occasion, to widen, deepen, embank, turn, alter, arch over, and cleanse and scour all and every and any of the watercourses, drains and ditches within the said parish, and which are not under or within the limits of the jurisdiction of any commission of sewers, and to lay out new drains &c. through any lands, with the consent of the owners or occupiers, and assess the expenses upon the occupiers and owners of the premises which receive benefit or avoid damage by reason of the same. Provided always, that no ditch, drain, or other watercourse shall be narrowed, filled up, altered, covered in or arched over, by any person or persons whatsoever, without the consent and approbation of the said trustees in writing being first had and obtained, nor in any other manner than is or shall be expressed in such consent; and in case any person shall so narrow, fill up, alter, cover in or arch over any such drain or watercourse whatsoever, within such part of the said parish, contrary to the intention hereof, he, she, or they shall for every such offence forfeit and pay the sum of 50*l*."

There was a clause that the act should be deemed and taken to be a public act, and should be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded.

At the trial before Lord *Lyndhurst* C. B. at the *Middlesex* sittings after *Michaelmas* term 1833, the act of parliament which was produced in evidence had not been exemplified under the great seal, and there was no proof that it had been compared with the original roll in the parliament-office, or that it has been printed by the king's printer. It further appeared that certain persons had taken a lease of a piece of land in *Islington* upon which the drain in question was constructed, for the purpose of building houses, which they agreed to erect, under the inspection of the lessor's surveyor for the time being. The defendant was such

surveyor; and during the progress of the work, applied on behalf of the lessees to the trustees under the act to sanction the construction of a drain of a certain size, as stipulated in their lease, along the line of a ditch in front of the ground built on. The trustees refused such permission, except on the terms that the drain should be made of the capacity of 13 feet. The lessees however built a smaller drain, and while one of the witnesses was engaged in arching it over, after a great part of it had been made, the defendant came to him and said "You must build it according to that which is done." For the defendant it was objected, first, that as this was a private act of parliament, it should have been regularly proved by a copy examined with the parliament roll; secondly, that the defendant being merely surveyor to the ground landlord, interfered only to see that the contract entered into with his principal was fulfilled, and was not such a "person" as could fall within the words of section 145. The jury gave a verdict for the plaintiff on the 20th count, that he "did arch over a drain" contrary to the terms expressed in a certain consent of the trustees.

In this term *Steer* obtained a rule to enter a nonsuit.

*Holt* showed cause in *Easter* term. It was unnecessary to prove the act of parliament by an examined copy. *Brett v. Beales* (a), which was relied on by the defendant, has been overruled in *Beaumont v. Moun-  
tain* (b). The other point was a question for the jury.

The Court here stopped him, calling on

*Steer* to support the rule. All that the defendant contends for is, that a party who seeks to give a private act of parliament in evidence, should prove that the copy tendered, if printed, was procured at the king's

(a) *Moody & M.* 421.

(b) 10 *Bing.* 405.

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printers. The clause in question does not make this a public act; for if the intent of a statute be particular, it shall, notwithstanding the words are general, be deemed a private statute (a). In *Brett v. Beales* (b) the evidence was rejected, though the copy of the act was printed by the king's printer. [Lord *Lyndhurst* C. B. That copy was rejected on account of its effect in evidence, not because it was not properly proveable in evidence without a copy examined with the parliament roll, but rather because it could not be received for the purpose for which it was offered. If my interpretation is correct, it is not requisite to overrule that case; in the marginal note it is said, that by the clause in question an act of parliament private in its nature is not "admissible" in evidence against strangers; that is of course, because it is a private instrument, although declared to be a public act for some purposes. In *Rex v. Sutton* (c) it was held that a public act of parliament is admissible as *prima facie* evidence of the existence of any facts which are stated in it. In the case of *Brett v. Beales* it was attempted to carry this doctrine a little farther, and Lord *Tenterden* held that as to its general nature and operation it was not a public act, though, still by the particular clause, it may be given in evidence as such. The case of *The King v. Shaw* (d) has been alluded to, where a private act was received in evidence without proper proof, but there the party objecting had himself put the act in operation. This act is of a private nature, because its provisions refer only to a single parish; and a statute which as to persons is general, but the matter thereof concerns singular things, as any particular manor or house, &c., or all the manors, houses, &c., which are in one or sundry particular towns, or in

(a) 6 Bac. Abr. tit. Statute (F.)

(b) M. & M. 421.

(c) 4 M. & S. 533.

(d) 12 East, 479.

one or divers particular counties, is a particular act which must be pleaded (a). It was even thought necessary to declare by a special enactment, that the *Irish* statutes, though made for one great province of the empire, should be received in evidence in *Great Britain*, 41 Geo. 3. U. K. c. 90. s. 9. But judges would not take notice of a private act unless it be pleaded, though it make void all proceedings to the contrary in such a case; the reason being, that it is important that the existence of public acts should not be put in issue because many ancient ones are lost; but that is not the case with modern private acts. Formerly, therefore, if a private act was not produced in an exemplification under seal, the party might plead *nul tiel record* (b). The effect of the introduction of this clause is only to save the necessity of pleading, and not to invest it with a public character: The mode of enrolment and promulgation, and of giving the royal assent, shows a distinction between public and private acts: a public act is enrolled by the clerk of parliament, and by him transcribed and sent to all sheriffs that it may be generally known, and the king's assent is given by the words *le roy le veut*. But a private act is only filed with the royal assent indorsed in the terms, *soit fait come il est desire*, and is never circulated by public authority. The law, therefore, has always required that a different degree of formality should be applied to the proof of a private act; and the plaintiff has not complied with it. He also mentioned a case of *Bromhead v. ———* at *Lincoln* summer assizes 1833, tried before *A. Park J.* in which a distress of a horse for toll at *Gainsborough* bridge was sought to be justified under a private act containing a public clause. He stated that that learned judge, after conference with *Taunton J.*, rejected the evidence for want of proper authentication.

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(a) *Holland's case*, 4 Co. 76. b. ; *Prigge v. Adams*, Skinn. 350.

(b) 8 Co. 28. b. Com. Dig. Parl. (R. 5.)

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As to the second point, the defendant was not a person to whom the penalty could attach; for the jury found that he was a surveyor for the lessor, a private individual. This action being in the nature of a criminal proceeding, the party who is charged must be clearly brought within the spirit of the enactment, for a penal law shall not be intended by construction. *Dwarris* on Statutes (a). "The rule which has uniformly been observed by all judges since the revolution, requires that all penal laws should be construed strictly; that no case should be holden to be reached by them, but such as are within both the spirit and the letter of such laws (b)." Here the defendant is not within the words of the act, which require that no drain shall be narrowed, or filled up, or arched over by any person without the consent of the trustees; for the defendant has, personally, done no act that is here forbidden, nor is he within the spirit; for at most, he has only given directions for other persons that an arch should be completed as it had been begun.

Lord LYNTHURST C. B.—The case of *Brett v. Beales* must have been misunderstood, or, from something equivocal which appears in its terms, is misreported. The copy of the act of parliament there tendered in evidence was rejected on the ground of its effect when admitted in evidence, not because it might not be received in evidence as an instrument properly proved. The whole reasoning of Lord *Tenterden's* judgment goes to show that it could not be received for the object for which it was offered, as it had no effect or operation on the question; that is very similar to *Beaumont v. Mountain*. The history of the progress

(a) P. 376.

(b) Per Best C. J. in *Fletcher v. Lord Sondes*, 3 Bing. 580; also per Bayley J. in *Denn v. Diamond*, 4 B. & C. 243; and Parke J. in *Mcirellis v. Banning*, 2 B. & Adol. 915; see *R. v. Croke*, Cowp. 26.

of these enactments is this: originally private acts of parliament could only be proved by a copy which had been examined with the parliament roll; that mode was found to be so expensive, that the legislature, to avoid the inconvenience, introduced a clause into such acts, that copies printed by the king's printer should be admitted in evidence. A difficulty then arose in proving that the copy produced had been printed by the king's printer; to obviate which the clause now in question was inserted, that certain acts should be deemed public acts. With regard to the other point, the jury found that as the defendant assisted, by his directions, the persons occupied in the work, he is personally liable though he did not engage in it with his own hands. If I direct a man to commit a misdemeanor, and he obeys me, I am guilty as well as he, for we are both principals.

The rest of the court concurred.

Rule discharged.

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EMERY, surviving partner of RICH deceased, *against*  
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**I**NDEBITATUS assumpsit for goods sold, work and labour, and on the money counts, on promises to

The statute of limitations in assumpsit begins to run

from the time when the cause of action accrues. Therefore, where by a local turnpike act the trustees were to pay first the expenses of obtaining the act, and next, the expenses of erecting toll-houses &c., a builder who brought an action for work and labour in so doing, more than six years after the work done, but within six years of the time when the trustees had funds in hand, by having paid off the expenses of the act, it was held that he was too late, as the action was maintainable immediately after the work done, though the execution would have been postponed.

Where a local turnpike act provided that all orders of the trustees should be entered in a book kept for that purpose, an order by them to pay a bill is not an act done so as to take a debt out of the statute of limitations, under 9 Geo. 4. c. 14., unless it is so entered in writing; the only act capable of taking a case out of the statute being the payment of principal or interest.

A clerk to turnpike trustees is not personally liable under a clause by which they may sue and be sued in his name.

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the plaintiff and one *Rich* his partner in his life-time; and another set of counts on promises to the plaintiff as surviving partner of *Rich*. Pleas: general issue and statute of limitations. The action was brought for work done in 1823 by plaintiff and his partner in erecting a toll-house for the trustees of a turnpike road, under a contract which had been agreed upon at a meeting of the trustees on 7th *October* in that year, and was entered in their minute book. The defendant was clerk to the trustees appointed under 54 *Geo. 3. c. 180.*, intituled "an act for repairing the road from *Potton* in the county of *Bedford*, and *Gamlingay* in the county of *Cambridge*, to *Eynesbury* in the county of *Huntingdon*." The act contained a clause "that all monies arising from subscriptions or tolls, or by borrowing or otherwise, should be vested in the trustees and appropriated in manner following: first, to pay the expenses of the act; secondly, of the toll-houses and bridges; thirdly, the interest of money borrowed; and fourthly, the principal borrowed." By another clause, "the trustees were to sue and be sued in the name of their clerk."

The trustees, at a meeting in 1829, made an order that the tradesmen should be paid, and the defendant said he had an order to collect the money to pay them accordingly; but this order was never entered in their book. The trustees at that time had not paid off the expenses incurred in passing the act: they had not funds till 1829. At the trial before *Denman C. J.* at the last assizes for the county of *Cambridge*, it was objected that the evidence did not support the claim against the defendant for goods sold and work and labour done "for the defendant at his request," as the work was done not for the defendant but for the trustees; and that the act gave no right of action against the clerk personally, but only directed that the

trustees shall be sued in the name of their clerk. The learned chief justice upon this directed a nonsuit, giving leave to move to enter a verdict for the plaintiff or have a new trial.

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*Kelly* showed cause. As the case was presented at the trial two points arose on the plea of the statute of limitations; first, that as by the provisions of the turnpike act the trustees were to be compelled to pay the expenses of that act before they paid the tradesmen employed, the statute did not begin to run till the expenses of the act were paid; secondly, that the order of the trustees in 1829 was an "act done," so that no acknowledgment in writing was necessary, or if it was, the usual course being to enter such orders in a book, it must be assumed to be entered there, as there was no proof that it was not in writing. As to the second point, there must be positive proof of some writing to take the case out of the statute, but in this case the presumption of any writing was negatived. By the turnpike act, all orders of the trustees are to be made at their meeting by a majority present; and by a subsequent clause, all orders are to be entered in a book and signed by the trustees, and such entries are to be deemed originals. The book was in court, but no order appeared. [*Parke* B. There is nothing in the second objection; the only point is, whether or not this debt can be sued for on a count for money had and received under the clause in the act for the appropriation of the money by the trustees, or whether that clause is simply a direction to the trustees how to apply the money without altering the nature of the contract.] [*Alderson* B. Were the goods sold to be paid for only when money was in hand?] There is nothing in the contract to defer the time of payment till they were in funds; and if there had been, there is no evidence to

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show that the trustees had not money in hand till within six years before the commencement of this action. [*Parke B.* The true question is, whether the trustees did not contract to pay immediately, or whether the clause as to the appropriation of the tolls makes any difference in the time of payment.] The clause enabling parties to sue the trustees in the name of their clerk does not make him personally liable. [*Alderson B. Wormwell v. Hailstone* (a) decided that he would only be liable to execution in respect of the trust funds in his hands. If an action may be brought against the clerk at any time, it shows that the operation of the statute commences at once, and that its operation is not postponed till the trustees are in funds. *Parke B.* The question is, when the cause of action accrued, not when the defendant could give satisfaction.] The Court here called on

*Biggs Andrews* and *Austin* in support of the rule. The nature of this act shows that the legislature contemplated the building toll-houses &c. by the trustees before they could be in funds to pay for them. [*Parke B.* By section 31, they might have borrowed money on mortgage of the tolls.] The act compels the trustees to build the toll-houses, but does not contemplate loans for this purpose. The trustees are only liable to pay in respect of funds received by them for tolls under the act. The plaintiff deals with them or their clerk, not as individuals but under the act. Unless they were in funds at the time of the judgment he could not have got judgment in the action; so that there was no necessity of introducing into the contract any stipulation as to the time of payment. Nor is price stipulated for, but only that the work shall be done in a workmanlike manner. The plaintiff contracts on the footing of the

(a) 6 Bing. 668.

act; if the trustees have no money he cannot compel them to borrow, and can get no fruitful judgment against them. Then can his right to recover accrue on the execution of the work? [*Parke B.* It may be a contract to be paid at once, though the plaintiff can get no satisfaction for several years after.] There is no cause of action till the trustees are in funds by having paid the expenses of the act. [*Gurney B.* Showing that they had no funds would not defeat the action, but would only go to delay the execution.] As to the statute of limitations, the order of the trustees is not a mere acknowledgment, but is an act done, and therefore not within 9 *Geo. 4. c. 14.*

**PARKE B.**—Suppose a man to contract with a testator, but the cause of action not to arise till after his death, so that the party can only sue as executor; as for example, a contract to pay in a year, within which time the party entitled to payment dies, there is a right of action without an immediate remedy. The defendant might plead *plene administravit*; but it is inherent to every contract that an action lies on it immediately, unless there is a stipulation to the contrary. This contract cannot be made other than a general contract on which an action lies as soon as the work is done, nor has the plaintiff taken it out of the statute of limitations by any note in writing. Where, as in this case, there is no act done by payment of principal or interest, there must, since 9 *G. 4. c. 14.*, be an acknowledgment in writing in order to take a case out of the statute of limitations: then if the plaintiff relies on the order of the trustees, he must show the terms of it; and as he has not done so, the rule must be discharged (a).

The other Barons concurring,

Rule discharged.

(a) See *Corpe v. Glyn*, 3 B. & Adol. 601.

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MORRIS *against* PARKINSON.

By the practice of a borough court its process was directed to the serjeant-at-mace, naming him, and to one or more persons also named, who are appointed by him to execute the process, having given him security to account to him as well for all fees received as for acts done in their offices. They attend at his office in order to receive process, and are dismissed by him at pleasure. *A ca. sa.* which had issued, directed to "T. P. serjeant-at-mace of the borough, and also to A. L.," not subjoining "his officer," was executed by A. L. without any

warrant, which by the practice, was never issued. Parol testimony was admitted to show the above facts relative to the officers' appointment and situation. It was also proved that when parties wish process to be executed by a person, not such officer, the serjeant-at-mace is applied to, and specially indemnified. Bail-bonds are taken in his name, and he is served personally with rules to return writs. The returns are made in the names of the officers actually executing them, but attachments for not doing so, &c., issue against the serjeant-at-mace. Held, in an action for a voluntary escape, that A. L. was the officer of the serjeant-at-mace, who was therefore responsible for his acts in the execution of process.

**D**EBT for escape against the defendant, serjeant-at-mace for the borough of *Liverpool*. The declaration stated, that whereas at the court of record of our lord the king of the borough of *Liverpool*, holden at *Liverpool* in the county of *Lancaster*, in the common hall of the same borough, and within the jurisdiction of the same court, that is to say, on the fourteenth day of *February* 1833, before C. H., esq. the then mayor, and R. G. and J. A. the then bailiffs of the said borough and judges of the same court, according to the custom of the same borough from time immemorial there used and approved of, came the plaintiffs by &c.: and there at the same court levied their certain plaint against one *Thomas Jones* on a certain plea of trespass on the case on promises to the damages of the plaintiffs of 30*l.*, for a certain cause of action arising to the plaintiffs within the jurisdiction aforesaid, to wit, for the non-performance of certain promises and undertakings then lately within the jurisdiction aforesaid made by the said *Thomas Jones* to the now plaintiffs, (the same being then and there matter and cause of action within the jurisdiction and cognizance of the same court,) and such proceedings were thereupon had in the same court, that afterwards, to wit, at the said court of our said lord the king, of the borough of *L.* aforesaid, holden at *L.*, in the county aforesaid, in the common hall of the said borough, and within the

jurisdiction of the said court, that is to say, on the 11th day of *July* 1833, before the said &c.: the plaintiffs, by the consideration and judgment of the same court, according to the custom of the said court and borough therein from time immemorial used and approved of, recovered against the said *Thomas Jones* 45*l.* 3*s.* 4*d.*, which in and by the said court, holden as last aforesaid, were adjudged to the plaintiffs for the damages which they had sustained, as well by reason of the not performing certain promises and undertakings before then made by the said *Thomas Jones* to the plaintiffs within the jurisdiction aforesaid, to wit, the promises and undertakings first aforesaid, as for their costs and charges by them about their suit in that behalf expended, whereof the said *Thomas Jones* was convicted, as by the record and proceedings remaining in the said court of *L.* aforesaid, and within the county aforesaid, and within the jurisdiction aforesaid, more fully appears; and which said judgment at the time of issuing the precept, and of the arrest and escape hereinafter respectively mentioned, remained in full force and effect, and not reversed, satisfied, or otherwise vacated: and the said plaintiffs further say, that afterwards, to wit, on 22d *August* 1833, to wit, at *L.* aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, for the recovery of the said sum of 45*l.* 3*s.* 4*d.*, the plaintiffs sued and prosecuted out of the said court then holden at *Liverpool* aforesaid, in the county aforesaid, and within the jurisdiction of the said court, before the said mayor &c. of the said borough, and judges of the court, according to the custom of the said court and borough there from time immemorial used and approved of, a certain precept, commonly called a *capias ad satisfaciendum*, against the said *Thomas Jones*, by which said precept it was commanded to the defendant, then being serjeant-at-mace of the said borough, and

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also one *A. Lord*, which said *A. Lord*, then and from thence until and at the time of the arrest and escape hereinafter mentioned, was the officer and bailiff of the said defendant, to wit, at &c., that they, or one of them, should take the said *Thomas Jones*, if he should be found within the said borough, and him safely keep, so that they, or one of them, should have his body before the mayor and bailiffs at the then next court of the said borough, to satisfy the plaintiffs the said sum of 45*l.* 3*s.* 4*d.* so recovered as aforesaid, and that one of them should then and there have that precept; and at the foot of the said precept was then and there written a memorandum, whereby the said defendant and the said *A. Lord* were directed to take the said sum of 45*l.* 3*s.* 4*d.* which said precept with the memorandum, afterwards, and before the return thereof, to wit, on 22*d* August 1833, at *L.* aforesaid, and within the jurisdiction aforesaid, was delivered to the defendant, who at the time of suing forth the said precept as aforesaid, and from thenceforth until and at and after the escape of the said *Thomas Jones* hereinafter mentioned, was serjeant-at-mace of the said borough, and as such serjeant-at-mace during all the time last aforesaid, according to the custom of the said court and borough there from time immemorial used and approved of, had and ought to have had the execution of the said precept to be executed in due form of law; by virtue of which said precept the defendant, so being serjeant-at-mace of the said borough as aforesaid, afterwards and before the return of the said precept, to wit, on the day and year last aforesaid, and within the jurisdiction aforesaid, to wit, at &c. took and arrested the said *Thomas Jones* by his body, and then and there by virtue of the said precept had and detained him in his custody in execution for the said sum so mentioned in the said precept as aforesaid, and kept and detained

him in his custody in execution for the said sum of money so mentioned in the said precept as aforesaid, within the jurisdiction aforesaid, from thence, until the defendant, so being serjeant-at-mace as aforesaid, afterwards, to wit, on the day and year last aforesaid, within the jurisdiction aforesaid, at *Liverpool* aforesaid, in the county aforesaid, without the leave or licence, and against the will of the said plaintiffs, suffered and permitted the said *Thomas Jones* to escape and go at large, and the said *Thomas Jones* did then and there escape and go at large wheresoever he would out of the custody of the defendant, he the defendant so being serjeant-at-mace as aforesaid, and the said sum of money so mentioned in the said memorandum as aforesaid, being then and still wholly unpaid and unsatisfied to the plaintiffs, to wit, in the county aforesaid, whereby an action hath accrued, &c. Plea: the general issue. At the trial before *Alderson J.* at the spring assizes for *Lancashire*, the judgment in *Morris v. Jones* was proved by an office copy, and the writ of ca. sa. (a) was shown to have been delivered to *Alexander Lord*, who was in attendance at the defendant's office, who arrested *Thomas Jones* under it, and after keeping him in custody twenty-four hours let him go at large. No warrant was issued on the writ. It was shown that the serjeant-at-mace of the borough court

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(a) The form was as follows:—

|                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Borough of <i>Liverpool</i> ,<br>to wit. | { It is commanded to <i>Timothy Parkinson</i> , serjeant-at-mace of the said borough, and also to <i>Alexander Lord</i> , that they or one of them take <i>Thomas Jones</i> , if he shall be found within the said borough, and him safely keep, so that they or one of them have his body before the mayor and bailiffs at the next court of the said borough, to satisfy <i>James Morris</i> 45 <i>l.</i> 3 <i>s.</i> 4 <i>d.</i> , which he lately in the court of the said borough by the judgment thereof recovered against the said <i>Thomas</i> , for the damages which were sustained as well by reason of the non-performance of certain promises and undertakings lately made by him to the said <i>James</i> at the borough aforesaid, as and for the costs and charges about his suit in that behalf expended; whereof the said <i>Thomas</i> is con- |
|------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

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is an officer employed in executing its process, and that defendant as such had appointed *Lord* and two others to be his officers to execute process of that court. They are usually called officers of the serjeant-at-mace. *Lord*, like others so appointed, had, on his appointment, given bond to the defendant to account to him for the fees and profits and to indemnify him generally. By the practice of the court, its writs are directed to the serjeant-at-mace by name, and to one or more of these, his appointees, also named jointly with him. In rare instances they are directed to him and to other persons who are not his officers appointed as above, but he is then applied to and specially indemnified. Each writ is delivered to the person who is to execute it, no warrant being ever made out upon it by the serjeant-at-mace. He takes the fees for execution of all process. No return is made by the officer till a rule to return the writ is served personally on the serjeant-at-mace. The officer who executed the writ then returns it in his own name. Bail-bonds are taken in the name of the serjeant-at-mace, and attachments issue against him on any default. He dismisses the officers. It was contended that the writ should have been directed to the serjeant-at-mace alone, who was the only proper officer of the court to execute process, and that the arrest being therefore illegal no action would lie for an escape. The only question of fact left to the jury was, whether *Lord* allowed *Jones* to go out of custody without the plaintiff's licence. They found that he did, victed in the said court, as by the record thereof it does appear, and that they or one of them have then and there this precept. Dated 8th August 1833.

By the court, 14th August 1833.

Cross, attorney for the plaintiff.

|               |     |    |   |
|---------------|-----|----|---|
| Damages ..... | £25 | 8  | 0 |
| Debt .....    | 19  | 15 | 4 |
| Total, ...    | 45  | 3  | 4 |

and that the debt in *Morris v. Jones* had been virtually satisfied, but not the costs. *Alderson J.* nonsuited the plaintiff, on the ground that the defendant was not liable for the acts of *Lord* to which he was not personally a party, and gave leave to move to enter a verdict for the plaintiff for such sum as the court should think fit. *Cresswell* having obtained a rule accordingly in *Easter term*,

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*F. Pollock* and *Wightman* now showed cause. Though the serjeant-at-mace has by peculiar usage the patronage of appointing these officers in the first instance, they are no less officers of the court when so appointed, and are recognized as such by the court, which directs writs to them, not exactly as officers of the serjeant-at-mace, but *nominatim*, and receives returns of writs from them in like manner. But first there is a variance in proof between the declaration, which alleges the writ to have been delivered to the defendant as serjeant-at-mace, and the evidence, which shows it to have been delivered to *Lord* the officer without ever coming to the hands of the defendant. [*Alderson B.* That involves the same question; for if they are the officers of the serjeant-at-mace, a delivery to them would be a delivery to him.] In *Foster v. Blakelock (a)*, *Bayley J.* distinguishes between the case where a party leaves it to the sheriff to execute a writ by his own officer, nominated by himself, and that where an attorney has selected an officer to execute the process. Officers of the serjeant-at-mace are not necessarily employed to execute process, and it is sometimes entrusted to others. Had the writ been directed to the serjeant alone, he might have selected whom to execute it; whereas, in this case, he was deprived of any opportunity to do so. The borough court recognizes the serjeant-at-mace and his officer as

(a) 5 B. & Cr. 328.

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being each of them principals, and must presume that the former executes the writ till informed of the contrary by the return of the officer who actually does so. The peculiar practice of the court distinguishes this case from that of a sheriff, who being the very individual recognized by the superior courts as executing process, is therefore liable for the acts of his bailiffs, of whom no cognizance is taken. Here, though *Lord* gave an indemnity bond to the defendant, yet as the court by its own act selected him to execute this process, he became the direct and immediate officer for that purpose, not of the serjeant-at-mace, through whose hands the process never passed, but of the court. How then can the serjeant-at-mace be liable for his acts?

Cresswell and *Addison* supported the rule. The whole question being, whether *Lord* was an officer of the borough court or of the serjeant-at-mace, it has been assumed throughout that he is an officer of the court, because he was named in the writ. All the other evidence goes clearly to show that *Lord* was only the officer of the defendant, who, as serjeant-at-mace, is the only person having execution and return of the process of the borough court, and stands in the same situation as the sheriff of a county, to whom writs out of the superior courts must be directed, or are void, *Grant v. Bagge* (a), *Bracebridge v. Johnson* (b). Then, if in point of law the writ could issue to no one else, *Lord* could derive no authority but from the defendant, who would therefore be liable for all his acts. The officers names are only introduced into the writs because, as it is not the practice for the serjeant-at-mace to issue warrants, he must otherwise execute all process in person. If *Lord* had been named in the writ as a deputy or officer of the serjeant-at-mace, no doubt of the defendant's

(a) 3 East, 128.

(b) 1 Brod. & B. 12; and see 6 Bing. 194; 2 B. & Adol. 416.

responsibility could have been entertained; and here the plaintiff has established his character as deputy by extrinsic evidence. *Lord* could not have interfered at all except in that character; for though by the practice the serjeant-at-mace does not return the writ in person, he is both ruled to return it and attached if he does not; so that the return by the officer is that of the serjeant-at-mace in the name of his deputy. Delivery of the writ to the defendant was proved in the same manner as that to the high sheriff, which is always so laid, and supported by proof of delivery at his under-sheriff's office. [Lord *Lyndhurst* C. B. These writs, though directed to another person by name as well as to the defendant as serjeant-at-mace, seem directed to him as principal, and to the other as his servant or officer.] Had *Lord* made a return instead of the defendant it would make no difference; for it is laid down in *Comyns's Digest*, tit. *Officer* (D. 5.), and tit. *Return* (C. 2.) (a), that a deputy ought regularly to act in his office in the name of his principal, but that an act by a deputy in his own name will be good, except in special cases, and a return to which the sheriff does not put his name is good though he shall be amerced.

LORD LYNTHURST C. B.—The evidence shows that these persons are appointed by and indemnify the serjeant-at-mace, and are styled his officers: *Lord* is appointed his officer and is so styled; and although the words “his officer or deputy” do not appear in the writ itself, we are of opinion that the extrinsic evidence sufficiently shows that he is so. It appears that plaintiffs call on the serjeant-at-mace to return the writs, by ruling him to do so; he therefore has, in fact, the execution of the process. But it is argued that the return is

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(a) See Com. Dig. tit. *Amendment*, (G. 12.)

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in fact made in obedience to such rules by the officer who made the arrest in his own name, and that he receives the fees: but it appears to me that he makes such return as the defendant's deputy. He gives bond to account for these fees to the serjeant-at-mace, and for indemnifying him generally. The process therefore appears to be directed to *Lord* as the officer of the serjeant-at-mace, who is therefore responsible for his acts in the execution of process. The verdict must be entered for 19*l.* 15*s.*, the amount of the costs, the debt having been virtually satisfied.

BOLLAND B.—Though the process does not state *Lord* to be an officer of the serjeant-at-mace, I see no objection to admitting parol evidence to show that he was in fact such officer, and that by the practice processes are directed to him as such.

ALDERSON B.—The words "his officers" should be inserted in these writs after the name of the individuals to which they are directed, for the omission of them compels a plaintiff to give evidence of their connection with the serjeant-at-mace. It was here proved that they are appointed by the serjeant-at-mace, who is indemnified for their acts; that he takes the fees received by them, is ruled to return writs, and attached for disobedience to such rules. On that evidence the case stands as if the defendant appointed *Lord* his officer in this and each particular case. The fact that the defendant is informed and takes special indemnity in cases where it is desired to direct process to persons not appointed his officers, struck me as material.

GURNEY B.—The evidence taken together shows that the officers are appointed by the defendant as his deputies. He is accordingly liable for their acts.

Rule absolute.

IN THE LORD TREASURER'S REMEMBRANCER'S OFFICE.

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The KING *against* the Mayor and Inhabitants of the City of LONDON.—In the matter of the fine set on MOZELY WOOLF.

WOOLF was indicted with *Levy* and *Kinnear* at the *Old Bailey* sessions in 1819, for a misdemeanor (a conspiracy) committed within the city of *London*. The indictment was removed into the court of King's Bench by certiorari. At the trial at the *Guildhall* sittings in 1819, before *Abbott C. J.*, the defendants were convicted, and being afterwards brought up by writ of habeas corpus, judgment was given by the justices in banc at *Westminster* (a), that *Woolf* should pay a fine of 10000*l.*, and be imprisoned for a certain period (b); *Levy* was also fined 5000*l.*, and ordered to be imprisoned. These fines were estreated in the court of Exchequer, and the right of the crown to them was specified in a document called a constat, lodged in that court, under the hand of the deputy clerk of the foreign estreats. The city of *London* disputed the right of the crown to *Woolf's* fine, by coming in and traversing the constat in the following manner.

The charters of the city of *London* vest in that body, fines for misdemeanors committed within the city, though imposed or adjudged by the court of King's Bench, sitting in banc at *Westminster*, after a trial at the sittings at *Guildhall*.

MORE COMMON MATTERS OF EASTER TERM,

In the 59th year of the reign of king George 3.

England. An estreat of fines imposed and set in the court of our lord the king, before the king himself at *Westminster*, of *Easter* term, in the 59th year of the reign of king *George 3.*, but not paid.

London.—Of *Lewis Levy* late of *London*, merchant, for certain conspiracies and misdemeanors, whereof

(a) See now 11 G. 4. & 1 W. 4. c. 70. s. 9.

(b) 2 B. & Ald. 609.

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he (with others) is indicted, and by a jury of the country is convicted, and his fine on the account aforesaid is taxed by the court here at 5000*l.*, and he is sentenced to be imprisoned in his majesty's gaol at *Glocester*, in and for the county of *Glocester*, for the term of two years; and it is ordered, that the marshal of the *Marshalsea* of this court, or his deputy, do deliver up the said *Lewis Levy* to the custody of the keeper of the said gaol at *Glocester*, to be kept in safe custody in execution, and until he shall have paid the said fine. And the said sheriffs of *London* are commanded of the goods and chattels, lands and tenements of the said *Lewis Levy*, to levy the said fine, and to have the said sum of money in this court, in three weeks of the *Holy Trinity*. And the like command is given to the sheriff of *Middlesex*, 5000*l.*

London.—Of *Mozely Woolf*, late of *London*, merchant, for certain conspiracies and misdemeanors, whereof he with others is indicted, and by a jury of the country convicted, and his fine on account of the aforesaid is taxed by the court here at 10000*l.*, and he is sentenced to be imprisoned in the house of correction in *Cold Bath Fields*, in and for the county of *Middlesex*, for the term of two years; and it is ordered, that the marshal of the *Marshalsea* of this court, or his deputy, do deliver the said *Mozely Woolf* into the custody of the keeper of the said house of correction in *Cold Bath Fields*, to be kept in safe custody in execution, and until he shall have paid the said fine; and the sheriffs of *London* are commanded, of the goods and chattels, lands and tenements of the said *Mozely Woolf* to levy the said fine, and to have the said sum of money in this court in three weeks of the *Holy Trinity*; and the like command is given to the sheriff of *Middlesex*. 10000*l.* (x de li.)

The claim of the mayor and commonalty and citizens of the city of *London*, upon the account of *E. H. Lushington* esq., coroner and attorney of our sovereign lord king *George 4.*, accounting for monies by him received, and payable to his said majesty, amounting to 591*l.* 18*s.* 10*d.* The same mayor and commonalty and citizens, by *William Foxton* their attorney, claim a certain fine of 5000*l.*, and also a certain fine of 10000*l.*, which have been retained as forfeited, and hereinafter particularly mentioned, but with which the said coroner and attorney is not charged, only to the amount of 591*l.* 18*s.* 10*d.*, part of the said sum of 10000*l.*, in his account, before the clerk of the pipe of his said majesty's Exchequer, in these words, to wit : [Here were set out again from the constat the estreats which have just been stated, concluding "as by a constat thereof under the hands of *Thomas Farrar*, deputy clerk of the foreign estreats of this court, appears" :] which said sums of 5000*l.* and 10000*l.* the said mayor and commonalty and citizens of the said city of *London* claim to belong to them, for that the said *Lewis Levy*, under whose name the said sum of 5000*l.* in the aforesaid constat is demanded, and the said *Mozely Woolf*, under whose name the said sum of 10000*l.* in the same constat is particularly demanded, were severally and respectively at the times when the said fines were so set and imposed upon them, by the said court of our said lord the king, before the king himself, the resiants of the said mayor and commonalty and citizens within the said city of *London*, and which said sums of 5000*l.* and 10000*l.* the said mayor and commonalty and citizens of the said city of *London* claim to belong to them; for that the said *Lewis Levy* and the said *Mozely Woolf* were severally and respectively at the time when the said offence and misdemeanors were committed, in respect whereof the said fines were so

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set and imposed as aforesaid, resiant within the city of *London*; and which said sums of 5000*l.* and 10000*l.* the said mayor and commonalty and citizens of the city of *London*, claim to belong to them; for that the said trespasses, offences, and misdemeanors, in respect whereof the said fines were so set and imposed upon the said *Lewis Levy* and *Mozely Woolf* as aforesaid, were committed by them the said *L. Levy* and *M. Woolf* within the said city of *London*; and also, for that *Henry 6th*, late king of *England*, by his letters patent, dated 26th *October*, in the 23d year of his reign, did grant to the citizens aforesaid, and their successors, all manner of fines, issues forfeited or to be forfeited, redemptions, forfeitures, pains, and amerciaments, of and for all manner of matters, causes, and occasions, and all things aforesaid; and whatsoever trespasses, riots, insurrections, offences, misprisions, extortions, usurpations, contempts, and other misdemeanors, done or to be done in the city or suburbs aforesaid, before the mayor, recorder, and aldermen of the city aforesaid for the time being, the justices of him, his heirs or successors, assigned or to be assigned to hear and determine felonies, trespasses, and misdemeanors in the city aforesaid, or the suburbs thereof, or the justices assigned to hold pleas before the said lord the king, his heirs or successors; the justices of the common bench, the treasurer and barons of the exchequer, or the barons of the exchequer, or whatsoever other justices or officers of him, his heirs or successors, adjudged or to be adjudged, together with the assessments and levying of the same, as often and when it should be needful, and treasure trove in the city aforesaid or the suburbs thereof; and also waifs and strays, and goods and chattels of all and singular felons and fugitives, for felonies by them committed in the city or suburbs aforesaid, or adjudged or to be ad-

judged before the said king, or his heirs or successors, or any of the justices aforesaid; and all merchandize and victuals which in coming to the city aforesaid to be sold in the said city or the suburbs thereof, and in the water of *Thames* and elsewhere within the said city and liberties and suburbs thereof, should be found forestalled and regrated, and which therefrom thenceforth should happen to be forestalled or regrated, and that the said citizens should have all and every thing which should happen to be adjudged by the said mayor or the justices aforesaid, to be due or to belong to the said king, his heirs or successors, of or for any recognizances or securities made for good behaviour and observing of the peace, before them or any of them, within the city aforesaid or the suburbs, thereby broken and not observed.

The claim then set out, stat. 1 *Ed.* 4. c. 1. ss. 3. 13. confirming the liberties and franchises of the city; then a charter of 20 *Hen.* 7. and another charter dated 18th Oct. 14 *Car.* 1. containing this clause:—"And the said king for himself, his heirs or successors, did also give and grant to the aforesaid mayor and commonalty and citizens of the city aforesaid, and their successors, all recognizances, &c., and also fines and issues of jurors, and all other issues, fines, and amerciaments, forfeited and to be forfeited, of and for all and singular the matters, causes, and occasions aforesaid; and of and for whatsoever transgressions, riots, offences, misprisions, extortions, usurpations, contempts of laws, violations, and other misdemeanors, done to or to be committed in the city aforesaid, or the liberties of the same, before the mayor, recorder, and aldermen of the said city for the time being, or any of them, or any of the justices of the said king, his heirs and successors, concerning the peace in the city aforesaid, or before the justices of him, his heirs and successors, assigned

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or to be assigned to hear and determine felonies, transgressions, and misdemeanors in the city aforesaid, or the liberties of the same; or before any justices of him, his heirs or successors, of nisi prius, for trying of things, causes, and matters in the city aforesaid, or other justices of him, his heirs and successors whatsoever, or any of them in the city aforesaid, adjudged or to be adjudged forfeited, or to be forfeited, together with the assessments and levies of the same, as often and when there should be need, saving nevertheless always and reserving to the said king, his heirs and successors, all and all manner of issues and amerciaments, commonly called fines or issues royal, thereafter from time to time to be imposed upon them the mayor, aldermen, and sheriffs of *London* and *Middlesex* for the time being, or one or any of them respectively, or by them to be forfeited and paid. A charter of 15 *Car. 2.* having been stated, the claim concluded thus:—

Wherefore the said mayor and commonalty and citizens of the city of *London* are, and at the said times when the said 5000*l.* and 10000*l.* were set out and imposed as aforesaid, were, a body corporate in deed and name, and persons able in law to plead and be impleaded, and to challenge, demand, and prosecute all the liberties, privileges, and franchises aforesaid, by the aforesaid name of mayor and commonalty and citizens of the city of *London*; by virtue of all which premises the said mayor and commonalty and citizens do claim to belong to them the aforesaid sum of 5000*l.* so as aforesaid set and imposed by the said court of our said lord the king before the king himself upon the said *Levis Levy*, and the said sum of 10000*l.* so as aforesaid set and imposed by the said court of our said lord the king before the king himself upon the said *Mozely*

Woolf; wherefore they pray that their claim may be allowed &c.

Replication.—And Sir *Thomas Denman* *knt.*, attorney-general of our said lord the now king, being present here in court on behalf of our said lord the king, and having heard the said claim of the said mayor and commonalty and citizens of the city of *London* of the allowance to them of the said fine of 10000*l.* set and imposed upon the said *Mozely Woolf* as aforesaid, for our said lord the king says, that notwithstanding anything by the said mayor and commonalty and citizens above alleged, the said fine of 10000*l.* ought not to be allowed to them, because the said attorney-general of our said lord the king says, that the said *Mozely Woolf*, under whose name the sum of 10000*l.* in the aforesaid constat is particularly demanded, was not at the time when the said fine was so set and imposed upon him by the said court of our said lord the king before the king himself at *Westminster*, the resiant of the said mayor and commonalty and citizens within the said city of *London*, as stated in their said claim, and this the said attorney-general prays may be inquired of by the country &c. And the said attorney-general of our said lord the king further says, that the said *Mozely Woolf* was not at the time when the said offence and misdemeanor was committed in respect whereof the said fine was so set and imposed upon him the said *Mozely Woolf* as aforesaid, resiant within the city of *London*, as stated in the said claim of the said mayor and commonalty and citizens; and this he the said attorney-general prays may be inquired of by the country &c. And the said attorney-general of our said lord the king further says, that the said fine of 10000*l.* so set and imposed upon the said *Mozely Woolf* as aforesaid, was not a fine, issue, forfeited redemption, forfeiture, pain or amercement set or imposed within the said city

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of *London*, or suburbs or liberties thereof, or by or before the lord mayor, recorder, and aldermen of the said city, or any or either of them; and this the said attorney-general of our said lord the king prays judgment if the said fine of 10000*l.* ought to be allowed to the said mayor and commonalty and citizens of the city of *London*.

Rejoinder.—And the said mayor and commonalty and citizens of the city of *London*, as to the said replication of the said attorney-general by him first above pleaded, and which he hath prayed may be inquired of by the country, do the like. And the said mayor and commonalty and citizens of *London*, as to the said replication of the said attorney-general by him secondly above pleaded, and which he hath prayed may be inquired of by the country, do the like. And as to the replication of the said attorney-general by him lastly above pleaded, the said mayor and commonalty and citizens say, that notwithstanding any thing by the said attorney-general therein above alleged, the said fine of 10000*l.* ought to be allowed to them, because they say, that the indictment on which the said *Moxely Woolf* was charged (together with others) with the said trespasses, offences, and misdemeanors, in respect whereof the said fine of 10000*l.* was so set and imposed upon the said *Moxely Woolf* as aforesaid, was presented and found by the jurors of our then lord the king of and for the city aforesaid, at the general session of oyer and terminer of our late sovereign lord *George* the third, holden for the city of *London* at *Justice Hall* in the *Old Bailey*, within the parish of *St. Sepulchre*, in the ward of *Farringdon Without*, in *London* aforesaid, on *Wednesday* the 6th day of *May*, in the 58th year of the reign of his said late majesty king *George* the third, before the then mayor, the then recorder, and certain aldermen of the said city for the

time being; and also before certain justices of his said late majesty king *George* the third, and others their fellows, justices of our said lord the king, assigned by letters patent of our lord the then king, made under the great seal of our lord the then king of the united kingdom of *Great Britain* and *Ireland*, to the several justices therein named, and others, or any two or more of them, directed to inquire more fully into the truth by the oath of good and lawful men of the city of *London*; and by other ways, means, and methods, by which they should or might better know (as well within liberties as without) by whom the truth of the matter might be better known of (amongst other things) all confederacies, trespasses, contempts, oppressions, deceits, and all other evil doings, offences, and injuries whatsoever, and also the accessories of them within the city aforesaid, (as well within liberties as without) by whomsoever and in what manner soever done, committed or perpetrated, and by whom or to whom, when, how, and after what manner, and of all other articles and circumstances concerning the premises and every of them or any of them, in any manner whatsoever, and the said premises to hear and determine according to the law and custom of *England*; which said indictment his said late majesty king *George* the third afterwards for certain reasons caused to be brought before him to be determined according to the law and custom of *England*; and the said mayor and commonalty and citizens further say, that the offences charged in the said indictment against the said *Moxely Woolf*, and of which he has been convicted as aforesaid, were charged and laid in the said indictment to have been committed, and were in fact committed within the said city of *London*. And the said mayor and commonalty and citizens further say, that the said indictment was afterwards tried at the sittings of *nisi prius* holden for the

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said city of *London*, at the *Guildhall* of and within the said city, before the right honourable Sir *Charles Abbott*, knt., then the chief justice of our lord the then king, assigned to hold pleas before the king himself, *John Henry Abbott* then being associated to the said chief justice; and that the said *Mozely Woolf*, together with others, was thereupon found guilty of the premises charged upon him in and by the said indictment. And the said mayor and commonalty and citizens further say, that afterwards in the court of our lord the king, before the king himself, at *Westminster*, the said *Mozely Woolf* being brought there into court in custody of the keeper of his majesty's gaol of *Newgate*, by virtue of a writ of habeas corpus, it was adjudged and ordered in and by the said court of our lord the king, before the king himself, at *Westminster*, that the said *Mozely Woolf*, for his offences aforesaid, should pay the said fine of 10000*l.* to our sovereign lord the king, and should be imprisoned in the house of correction in *Cold Bath Fields*, in and for the county of *Middlesex*, for the term of two years; and it was further ordered by the said court, that the said marshal of the *Marshalsea* of his majesty's court of King's Bench, or his deputy, should deliver the said *Mozely Woolf* into the custody of the keeper of the said house of correction in *Cold Bath Fields*, to be kept in safe custody in execution of the said judgment, until he should have paid the said fine of 10000*l.*; and this they the said mayor and commonalty and citizens are ready to verify, wherefore they pray judgment, and that their said claim to the said fine of 10000*l.* may be allowed to them &c. Demurrer and joinder.

Wightman for the crown. The question is, whether under the charters of *Hen. 6.* and *Car. 1.* or either of them, the city is entitled to the fine imposed by the

King's Bench at *Westminster*, on the ground that the offence was committed in the city by *Woolf*, who at that time, and also at the time of imposing the fine, was a resiant in the city. These are the only grounds stated in the claim of the city; and it is on the validity of that claim, as set out in the traverse of the constat, that the court will have to determine without reference to the later pleadings. The crown contends that the city should have further alleged in their claim that the fine was *adjudged* and *imposed* in the city, or at least, that the trial of the indictment took place within the city. On the face of their claim the fine appears to have been imposed "by the court of our lord the king before the king himself," that is to say, by the court of King's Bench at *Westminster*, upon a resiant of the city of *London*, for a misdemeanor committed therein. As the claim of the city is founded upon the charters set out in it, it must be brought distinctly within their terms. For the construction of a grant of the crown differs from the grant of a subject in this, that it should be construed most strictly against the grantee, nor will any thing pass to him but by clear and express words (*a*). Thus it was decided in *Rex v. Sutton* (*b*) that choses in action of a *felo de se* do not pass by a crown grant of the "goods and chattels of felons," nor mines royal, as gold or silver mines by a grant of "all mines" or of "soil and waste." *Case of Mines* (*c*). Thus, when *Hen. 7.* being seised of two manors, viz. *Ryton* and *Condor* in *Salop*, granted "ex certa scientiâ et mero motu illud manerium de *R. et C. cum pertinen'* in com. *Salopia*," the grant

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(a) See *Earl of Cumberland's case*, 8 Rep., 166 b. and the case of *Alton Woods*, 1 Rep., 41 a. Thomas and Frazer's edit. vol. i., p. 101. n., 110.

(b) 1 Saund. 273, 2 Roll. Ab. tit. *Prerogative del Roy*, C. pl. 2. citing 8 H. 4.

(c) Plowd. 314 a., 336 b., 339; 1 Rep. 46 b.

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was held void, though had it been that of a subject it would have passed both manors (a). So where *Edw. 6.* granted to *C. omnes terras dominicales manerii de Wel-low &c.*, it was adjudged that customary lands held by copy, parcel of the manor, did not pass, though without doubt they would in a subject's case (b). Again, in *Willion v. Berkeley* (c) it is thus laid down: In the common law the grant of every common person is taken most strongly against himself and most favourably towards the grantee, but the king's grant is taken most strongly against the grantee and most favourably for the king. Keeping this rule in view, has the crown, by either or both charters, granted to the city of *London* fines imposed out of the city on persons guilty of offences committed within it? Now, the charter of *Hen. 6.* grants all fines, &c., of and for all manner of matters, causes, &c. done in the city, before the mayor &c., the justices assigned to hold pleas before the king, &c., &c., adjudged or to be adjudged, and treasure trove in the city aforesaid, or the suburbs thereof. The words "in the city aforesaid" only refer to "adjudged," and the grant only passes such fines for offences committed within the city as are also adjudged within it before any of the justices mentioned in the charter assigned to try misdemeanors within it, *e. g.* at courts of oyer and terminer. [Lord *Lyndhurst* C. B. The charter of *Hen. 6.* speaks of the treasurer and barons of the exchequer as of the court here, and not as of a part of a court elsewhere. Is any commission of oyer and terminer and gaol delivery ever directed to the treasurer? The charter speaks of the courts at *Westminster*, which are named in their proper order; first, the justices assigned to hold pleas before the king him-

(a) *Scacc. 29 Eliz.*, stated 1 Rep. 46 a.

(b) *Scacc. 15 Eliz.*, stated 1 Rep., 46 b.; and see *Plowd. 243.*

(c) *Plowd. Comm. 243.*

self, i. e. the King's Bench; second, the justices of the common bench, and then the treasurer and barons, or the barons of the exchequer. Then what prevents the city from taking fines imposed for offences committed within its limits, whether adjudged within them, or in any of the superior courts at *Westminster*? How is that claim inconsistent with the charter of *Hen. 6*? It may be argued, however, that the charter of *Charles 1.* is couched in narrower terms. Any general effect which may be ascribed to the words of the charter of *Hen. 6.* is restricted by that of *Charles 1.* the terms of which are so comprehensive and precise, that it appears like a regrant of all the city privileges after a surrender of them. In that charter the words "in the city aforesaid adjudged or to be adjudged," clearly apply to the first words of the clause by which fines are granted, and mean that all fines for offences committed in the city and therein before the mayor or other judges adjudged, are to be taken by the city. It would have been absurd to insert the more particular words at all, unless in a sense restrictive of the larger terms of the charter of *Hen. 6.*; nor is that view of the charter of *Charles* inconsistent with that of *Hen. 6.* In conveyances every restriction has its proper operation. General words in a grant may be overthrown by restrictive words, provided the latter concur with the general words of the grant; e. g. if *A.* give all his lands in *B.* in the tenure of *C. and D.*, and he has lands in *B.*, but not in the tenures named, yet all the lands pass; *Clay v. Barnett*(a).

Follett for the city.—The question is, whether, in order to support the claim of the city to this fine, it is necessary to show it to be imposed or adjudged within

(a) *Godbolt*, 237. *M.* 11 *Jac.* C. B. 14 *Vin. Ab.* 63, and 89, tit. *Grant*, (H. 13.) pl. 63. and (Q.) pl. 4. See *Altham's case*, 8 Rep. 134, and *Harris & Wing's case*, 3 *Levinz*, 244; and *Vin. Ab.* tit. *Grant*, (H. 13.) pl. 39.

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the city? Now, the facts admitted on the rejoinder are, that *Woolf* committed the offence within the city, that a true bill was found for it at the *Old Bailey* within the city, that the indictment was removed by certiorari into the King's Bench, and tried at *Guild-hall* in the city before the chief justice, and that the fine was imposed by the court of K. B. at *Westminster*. Even according to the rule of construction of crown grants laid down on the other side, the fine clearly belongs to the city under the charter of *Hen. 6.*, which grants to them all fines for offences committed within the city before the justices in the charter named, "adjudged or to be adjudged." Those justices are, first, the mayor, recorder, &c., justices assigned to hear and determine felonies &c. in the city, viz. at the *Old Bailey*; then the courts of King's Bench, Common Pleas, and Exchequer, in their rank and order, mentioning "the justices" of each collectively as a court. Then the grant cannot be intended as confined to fines actually adjudged within the city by those courts, for no instance appears of their having ever sat there, and the Common Pleas, since 9 H. 3. M. C. c. 11. has become stationary at *Westminster Hall* (a). The grant then is general of all fines for offences committed within the city, wheresoever adjudged by the courts named. It is said that the clause in the charter of *Charles* will be an unmeaning repetition of the former grant, unless read in a sense restrictive of it. But they differ in this, that the charter of *Charles* grants, for the first time, fines imposed by justices of peace, while it confines its grant of fines to those imposed for offences committed within the city or its "suburbs," a less comprehensive term than that of "liberties" used in the former charter. [*Bolland B.* Liberties and suburbs are not to be taken as synonymous where both terms are used. Places exist,

(a) 3 Bla. C. 39; 1 id. 33.

as *Duke's Place* and part of the *Thames*, which are within the liberties though not the suburbs (a).] Again, it excepts fines or issues royal imposed on the mayor and sheriffs; which must have been imposed in the courts at *Westminster*. The words at the end of the clause in the charter of *Car. 1.* "in the city aforesaid adjudged or to be adjudged forfeited," must be read in connection with "other justices of him, his heirs, &c." But if its construction be doubtful, that circumstance cannot deprive the clear words of the charter of *Hen. 6.* of their natural effect. Upon those words they rest their claim, though it may be mentioned that by a clause in the charter of *Hen. 6.* the mayor, recorder, sheriffs, &c., to whom a certiorari is directed, are not compelled to certify or send the indictment, recognizance, or security of the peace, taken or found before them, but may send only the tenors or transcripts thereof. Then, as in contemplation of law (b), the record itself remains in the city, the judgment must be taken to be given there, though pronounced in the *K. B.* at *Westminster* on the transcript. The charter is strong to show that the city might themselves enter up and execute the judgment. [Lord *Lyndhurst* C. B. According to the argument for the crown, the attorney-general, by removing the indictment by certiorari, might have always deprived the city of the fine. (c)]

Wightman replied. The court of Common Pleas could not impose the fines intended by the charter of *H. 6.* Its general words, "justices assigned to hold pleas" &c., mean not the courts collectively, but the

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(a) See *Jones v. Walker*, Cowp. 624.

(b) See now 11 G. 4. & 1 W. 4. c. 70. s. 9., and *Rex v. Eaton*, 2 T. R. 89.

(c) The modern practice is said to be to remove the record, and see *Rex v. Richardson*, 2 Leach, C. C. 560, on the city's right to retain the record. See *Hawk. P. C.*, b. 2. c. 25. s. 97. c. 27. s. 26.


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individual judges. The fine, by whatever court imposed, must be adjudged in the city. [*Bolland B.* As you apply the words "in the city aforesaid" to "adjudged," how can you reconcile them to the former power of the mayor and aldermen over the city and the liberties of the same? For an offence committed in the city liberties might be adjudged on there by a justice of peace of the city.] [Lord *Lyndhurst C. B.*— Besides the justices enumerated by the charter "other" justices are named. The judges of the city sheriff's court are not, as such, justices of peace, but might fine a juryman, or for a contempt. Then the words of the charters are satisfied.]

Lord LYNDHURST C. B.—The true question is, what is granted by these charters? I see no inconsistency between them. The words of that of *Hen. 6.* are clear and general as far as respects the place of adjudication of the fine. The words "in the city aforesaid or the suburbs thereof," apply to the treasure trove only. In the charter of *Charles*, the words "in the city aforesaid" are to be read with "other justices" in the line preceding, so as to restrict that general description to justices "in the city." By that interpretation the charters entirely consist and are not at all at variance. However, before giving judgment we should see accurate copies of the clauses in question, as they stand in the original Latin of the charters.

On a subsequent day Lord *Lyndhurst* said, that the court, after examining the Latin terms in which the charters were couched, had seen nothing which called on them to vary their former opinion. He added, that the nature of the superior courts, the fines adjudged by which were granted to the city by the charter of *Hen. 6.*, including those imposed by the Common

Pleas, which was stationary at *Westminster*, showed distinctly the intention of that charter, that all fines for misdemeanors committed within the city should pass to the citizens wheresoever they might be imposed by the courts mentioned. Taking the charter of *Charles 1.* by itself, the grant may appear to be more limited, but at all events, as that of *Hen. 6.* is not shown to have been surrendered, its comprehensive words will not be affected by the more limited but not inconsistent terms of the latter.

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 The KING
 v.
 The Mayor and
 Inhabitants of
 the City of
 LONDON.

Judgment in favour of the claim of the city.

PERRY *against* PATCHETT.

A Rule had been obtained for setting aside the writ of summons with all subsequent proceedings for irregularity with costs, the amount of the debt not being indorsed on the writ. The plaintiff had agreed with the defendant to buy a rick of hay, standing on a field in his occupation for 65*l.*, and to cut and remove it by *May*. The plaintiff paid the defendant the 65*l.* In *February* the defendant's landlord having distrained on the hay, it was sold again to the plaintiff for 55*l.*

A stack of hay standing on the defendant's premises was sold by him to the plaintiff, who was to take it away by a fixed day. Before the time arrived, the defendant's landlord distrained it for rent. Held, that the amount of debt and costs need not be indorsed on the writ of summons, as the cause of action was partly for the loss of the right to keep the hay on the ground,

Whateley showed cause. The *Reg. Gen. of Hil. 2 W. 4. No. II.* [*ante*, Vol. II. p. 351,] which by *Reg. Gen. Hil. Mich. 3 W. 4. No. V.* [*ante*, Vol. III. p. 2,] is made applicable to all writs of summons, distringas, capias, and detainer issued under the uniformity of process act 2 *W. 4. c. 39.* does not extend to actions for unliquidated damages. The plaintiff sues to recover back the money paid to the defendant, and also the plaintiff's damages, in losing the right to have the hay remain on the defendant's premises till *May*.

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Richards in support of the rule. The action is substantially to recover a debt, viz. the value of the stack. But

Per Curiam.—This action is also brought to recover damages for the loss of a further benefit to which the plaintiff was entitled under the contract, viz. the use of the defendant's premises for the purpose of keeping the hay there. Those are unliquidated damages, which can only be ascertained by a jury. The rule, therefore, does not apply.

Rule discharged with costs as moved (a).

(a) See *Tarling v. Baxter*, 6 B. & Cr. 360; *Bunney v. Poyntz*, 4 B. & Adol. 568.

MARY WILLS, Executrix of W. WILLS, against NOOTT and Another.

A note for 200*l.* with lawful interest reserved from a day prior to the date, requires a stamp applicable to a note for 200*l.* only.

ASSUMPSIT on a promissory note in the following form:—

“ March 6th, 1827.

Two years after date we promise to pay *Wm. Wills*, or order, two hundred pounds, with lawful interest for the same, from the first day of *February* 1827, for value received.

Thomas George Noott.

Thomas Lane.”

The note was drawn on a 5*s.* stamp, which was the proper one for a sum not exceeding 200*l.* payable more than two months after date. It was objected at the trial, that the reservation of interest prior to the date of the note, made the principal sum secured more than 200*l.*, and that therefore the stamp should have been

6s. instead of 5s. *Parke* B. thought the stamp sufficient, and directed a verdict for the plaintiff, but gave leave to move to enter a nonsuit.


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Cripps now moved accordingly, and contended that this case did not fall within the decisions of *Pruessing v. Ing* (a), and *Israel v. Benjamin* (b), which only established that a note reserving interest from the date did not, by reason of such reservation, require a higher stamp than was sufficient for the principal sum. In the former of those cases *Abbott* C. J. said, "The object of the legislature was to impose a pro rata" stamp duty upon the sum actually due at the time of the taking the security, and not upon what might become due in future for the use of the money. The question therefore is, What was the sum due at the time when the note was given? for that is the sum secured. In the other case Lord *Ellenborough* thought the stamp sufficient, "as there was no interest due when the bill was drawn." The reasons of the decisions in each case seem to be authorities in favour of the defendant. [*Alderson* B. They are only obiter dicta.] Admitting them to be so, they are the best authorities in new cases, and applying this case to C. J. *Abbott's* words in *Pruessing v. Ing*, it is impossible not to say that the principal sum secured is not only 200*l.*, but the interest for thirty-five days besides, and the judgment of Lord *Ellenborough* in *Israel v. Benjamin* exactly meets the present. To hold this stamp sufficient would open a door to evade the usury laws. Thus a person might, on a note payable two years after date, reserve interest on his note from a day two years prior to its date, and thus obtain 10 per cent. If this be so, this note (if the interest prior to the date is not to be considered as principal) is void for

(a) 4 B. & Ald. 204.

(b) 3 Camp. 40.

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usury. [*Parke B.* referred to *Dixon v. Cass* (a), *Doe v. Snaith* (b), *Deardon v. Binns* (c), and said that the principle to be derived from these was, that the principal sum mentioned in the security should be the measure of the stamp, and that any collateral and indefinite matters could not be taken into account to increase the stamp.] *Id certum est quod certum reddi potest*, and the amount of interest prior to the date is here calculable exactly. In *Dixon v. Cass*, the reservation of the amount of bankers' commission on a bond for 1000*l.* made a higher stamp necessary than what would have covered a bond for that amount only; that case seems to be in favour of the defendant here. In *Doe v. Snaith* there was nothing reserved which could not have been enforced without any such reservation; a bill or note will carry interest from the time it becomes due, without any mention of it in the bill; but here the interest prior to the date could never have been recovered without express mention of it, and it must therefore be considered as a part of the principal sum secured.

PARKE B.—I think that the 200*l.* only can be said to be the sum secured by this note. The sound principle is, that what is expressed to be the principal sum secured, shall regulate the amount of the stamp. Here 200*l.* is that sum, all the rest is interest.

ALDERSON and BOLLAND B*s.* concurred.

Rule refused.

(a) 1 B. & Adol. 343. (b) 8 Bing. 146. (c) 1 Mann. & R. 130.

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PHILLPOT *against* ASLETT.

IN 1831 the defendant owed the plaintiff 41*l.* 5*s.*, and was discharged under the insolvent act 7 G. 4. c. 57. Having afterwards again dealt with the plaintiff, he gave him a bill for the balance then due. The old debt was not specifically included, but defendant had made several payments on account for debts incurred since his discharge, and the 41*l.* 5*s.* formed in fact part of the bill given. He did not defend an action brought against him on the bill, but gave a warrant of attorney to enter up judgment for its amount and costs, which judgment was entered up accordingly. A rule was obtained for setting aside the judgment, on the ground that by 7 G. 4. c. 57. s. 61. the defendant was not liable on the bill, it being in part given "for the same debt or sum of money" for which he was before liable. Cause was shown, in the first instance, that the defendant should have pleaded his discharge to the action on the bill.

If a discharged insolvent gives a bill to a creditor for the balance due, as well on account of debts incurred before as since the discharge, he can only be relieved from an action on the bill by pleading his discharge under the insolvent act 7 G. 4. c. 57. s. 61; and if he give a warrant of attorney to enter up judgment for the amount of it and costs, the court will not set it aside on motion.

Per Curiam.—The bill was accepted by the defendant after his discharge under the insolvent act, for the balance due by him to the plaintiff, as well before as after that event. That bill having been sued on, the defendant had the opportunity to plead his discharge, but having given a warrant of attorney instead, he has lost the proper time and mode of relieving himself.

Rule discharged (a).

Platt supported, *Tomlinson* showed cause against the rule.

(a) See *Evans v. Williams*, ante, Vol. III. 226.

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DRAKE *against* LEWIN.

Payment of money into court on a declaration in assumpsit containing special and common counts founded on a variety of dealings between the parties, cannot be applied by the plaintiff to any particular count only, but the defendant may so apply it to the damage therein stated to have been incurred.

Where payment into court was made generally on a declaration containing one count charging the defendant for the produce of sales as factor on a *del credere* commission, and another charging him

with having negligently sold plaintiff's flour to an insolvent person; the defendant, in order to show the transaction in question to be one which was not admitted by the payment into court on the first count, gave letters in evidence to show that the plaintiff had admitted the sale in question to be his own affair, and not guarantied by the defendant. The jury found a verdict for the defendant, and the court did not disturb it, on the ground that this evidence was improperly received.

An authority to proceed in an action to recover a debt due from a party, does not sanction opposing his discharge in the insolvent debtors' court.

ASSUMPSIT. The first count stated, that in consideration that plaintiff had retained and employed the defendant for commission and reward to him in that behalf, to sell and dispose of 100 sacks of flour of the plaintiff's of 800*l.* value, the defendant promised the plaintiff to be responsible to him for the prices of the same. Averment, that the defendant sold the goods for 800*l.*, but that although a reasonable time for payment hath long since elapsed, defendant hath not paid the same or any part thereof to the plaintiff. The second count was on a promise to pay the plaintiff the money the goods should sell for, after deducting commission. The third stated a promise to render a just and reasonable account. The fourth count stated, that in consideration that plaintiff had retained and employed defendant for commission and reward to him in that behalf, to sell and dispose of certain other flour of 800*l.* value, defendant promised plaintiff to use due care in and about the sale of the said last-mentioned flour. Averment, that the defendant did not use due care &c., but, on the contrary, carelessly, negligently, and without due and proper caution and inquiry, sold and disposed of the said last-mentioned flour to one *J. Worts* upon credit, for a large sum of money, to wit, the sum of 800*l.*, the said *J. Worts* being then and

there in insolvent circumstances, and such said last-mentioned sum is still wholly unpaid to the said plaintiff, and the said *J. Worts* having since, to wit, on &c., taken the benefit of the act then in being for the relief of insolvent debtors, he the said plaintiff is likely to loose the last-mentioned sum. There were also counts for goods sold and delivered, for money had and received, and on an account stated. Pleas of non assumption, and set-off to the common counts, for work done and materials provided, journies and attendances, money paid, and for a balance due on an account stated. The particulars of the plaintiff's demand were for 164*l.* 10*s.* alleged to be due on the balance of account for flour consigned by the plaintiff to the defendant as his agent or factor, between 10th *September* 1828, and 20th *December* 1829. The defendant, in his particulars of set-off, debited the plaintiff with 110*l.* 5*s.* for flour sold and delivered to *Worts* between 25th *May* and 25th *August* 1829, but which had become a bad debt; 9*l.* 5*s.* 6*d.* for the plaintiff's share of expense of journies taken by the defendant in pursuit of *Worts* in order to recover the above debt, and 45*l.* as cash paid for the plaintiff's proportion of a bill of costs incurred in attempting to recover the debt from *Worts*. Among a multiplicity of items of set-off, the above were those disputed by the plaintiff. A sum of 9*l.* 5*s.* 6*d.* had been paid into court generally on the whole declaration. At the trial at the *London* sittings before *Gurney B.*, it appeared that the plaintiff, a country miller, had entrusted the defendant, a flour factor in the neighbourhood of *London*, with flour to sell for him at a commission of sixpence per sack if sold to factors, and one shilling per sack if sold to bakers; but it was not shown that the defendant had guarantied the payment by the vendees, or charged or accepted a del credere commission for so doing. In *August* 1829, *Worts*, a

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baker, who had often previously bought the plaintiff's flour of the defendant and paid for it, owed 110*l.* 5*s.* for the plaintiff's flour, and being supposed to be attempting to escape from his creditors by going to *America*, was pursued by the defendant and arrested for the debt. The action proceeded against *Worts* with the sanction of the plaintiff, till he applied for his discharge under the insolvent act. His discharge was opposed on behalf of the plaintiff among other creditors, but there was no evidence that the plaintiff had authorized such opposition. The share of the costs of the action and opposition debited to the plaintiff amounted to 45*l.* The only evidence adduced by the plaintiff to establish his consignment of flour to the defendant consisted of three accounts current rendered by the defendant to the plaintiff, in which he stated himself to be the plaintiff's factor. The last item in the third and last account was as follows: "1831, *March* 17th. To balance paid by Mr. *Drake's* order to *Barnett and Co.*, 20*l.* 3*s.* 4*d.*" Upon this, *John Williams* for the defendant objected that the plaintiff must be nonsuited, as the last account between the parties was balanced; and it appeared from the particulars that the balance of 20*l.* 3*s.* 4*d.* had been paid by the defendant to the plaintiff's order. On this point the learned baron gave leave to the defendant to move to enter a nonsuit if the plaintiff should have a verdict. The defendant's counsel proceeded to prove his set-off, admitting that the balance was against him, unless he established the three items above mentioned. He contended, however, that the first count on a *del credere* commission was not proved. For the plaintiff, it was answered, that the special contracts alleged in the declaration were admitted by the payment of money into court generally. The defendant's counsel replied, that that payment into court admitted the plaintiff's demand only to the amount of

the sums paid in, and that as it appeared by the plaintiff's account that there had been sixteen transactions between the parties within the period fixed by the particular of demand, it was competent for the defendant to show that the first sum he claimed to set off for flour sold to *Worts*, was an exception to the course of dealing stated in the first count; and also to defend on every count as to all beyond the amount paid in. The learned baron hereupon admitted in evidence, on the part of the defendant, letters written by the plaintiff, showing that he treated *Worts's* debt as his own concern, and that he had no guarantie from the defendant for any sales he might effect, but refused evidence tendered to show that by the general usage of the trade there could be no such guarantie on the low terms stipulated; and assuming that the payment of money into court admitted the *del credere* contract in the first count, he left it to the jury to say, whether the defendant's dealing with *Worts* formed a special exception to the general course of dealing between plaintiff and defendant; and if the verdict should be for the defendant, gave leave to move to enter a verdict for the plaintiff, on any one count, if the letters were improperly admitted. The jury found, that the defendant did not guarantie the payment of *Worts's* debt, and that the plaintiff had given the defendant a general authority to sue at law to recover from *Worts* the debt due from him, which authority was never withdrawn, and that there appeared a reasonable prospect of reaping some benefit by opposing his discharge in the insolvent court.

In *Easter* term, *Goulburn* Serjt. for the plaintiff, obtained a rule nisi to set aside the verdict for the defendant, and to enter a verdict for the plaintiff, either for 164*l.* 10*s.* the whole amount sought to be recovered, if the letters ought not to have been received in evi-

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dence for the defendant, or for 45*l.*, the whole amount of the law charges. Subsequently *Platt* for the defendant obtained a conditional rule for leave to enter a nonsuit, in case the verdict of the jury for the defendant should be set aside. Both rules now came on for argument.

Platt and *Swann* for the defendant showed cause against the rule for entering a verdict for the plaintiff. The plaintiff's accounts showed a variety of transactions between him and the defendant, some of which may have been on a *del credere* commission, and others not. No contract for a *del credere* commission was proved, but if it had, it does not necessarily follow that that contract and authority applied to all the dealings between the parties, or that none took place between them on different terms. Unless the payment of money into court generally, without restriction to the common counts, admits every contract stated in every count, whether consistent with others so stated or not, and also a breach of it with damages on each count, exceeding the amount of the sum paid in, the defendant was not estopped from giving the plaintiff's letters in evidence to disprove his liability on the *del credere* commission alleged in the first count. The defendant contends that though such payment into court admits the special contract and damages accrued to the amount paid into court, it admits nothing more, and does not prove that all the transactions between the parties necessarily took place under that contract. Again, as the contract stated in every count is admitted, some of the money paid in must be taken to be due on each count, as it does not appear to be paid in on any particular one; but if *ls.* should be paid in generally on a declaration consisting of fifty counts, it could not be so applied to each. The defendant, when

he pays money into court, expressly contends that the breaches do not extend beyond the sum paid in (a). In the recent case of *Bulwer v. Horne* (b), where a payment into court generally was held to admit conclusively that an action lies on every count of the declaration, the contract was an isolated one by the defendant, a carrier, to convey the plaintiff to a particular place. Again, in *Cox v. Brain* (c), where there was a specific bargain to pay a particular sum, the payment into court of a smaller amount by admitting the bargain, admitted also the sum which was originally due. See *per Curiam* in *Stoveld v. Brewin* (d). So in *Yate v. Willan* (e), where a payment into court on a promise by the defendant to carry goods for the plaintiff, was held to estop him from showing the actual contract to have been, that he should not be answerable for goods lost to a greater extent than the sum paid in, unless entered and paid for accordingly; the special counts on which only the payment into court was made, were referable to that single promise only. [*Parke B. Seaton v. Benedict* (f), and *Meager v. Smith* (g), were cases in which this subject underwent much consideration (h). In *Bulwer v. Horne* there was but one contract to which the payment into court could possibly refer.] In *Mellish v. Allnutt* (i), the declaration was on a policy of assurance, with counts for money paid, had and received, and on an account stated; and it was held, that a payment into court generally only admitted the contract, but did not preclude the defendant from disputing his further liability beyond that payment for

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(a) See *Stoveld v. Brewin*, 2 B. & Ald. 118.

(b) 4 B. & Adol. 138; and see *Ravenscroft v. Wise*, post, 741, argued some days after this case.

(c) 3 Taunt. 95. (d) 2 B. & Ald. 118. (e) 2 East, 128.

(f) 5 Bing. 28. (g) 4 B. & Adol. 673.

(h) See *Ravenscroft v. Wise*, post, 741. (i) 2 M. & S. 106.

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goods not loaded according to the terms of the policy. In *Stafford v. Clark* (a), Best C. J. was of opinion, that the payment of money into court on several general counts, one of which only is applicable to the plaintiff's demand, admits a cause of action on that count only. The same principle applies here, where of several special counts, only the fourth, viz. for goods sold under a commission, not of del credere, was proved. It is here sought to make the payment of money into court admit two contracts wholly inconsistent with each other, as stated in the first and fourth counts. No damages could be recovered on the first which states a del credere commission. *Everth v. Bell* (b) was an action on a policy of insurance on fish, "free from average, unless general on the ship stranded." Money was paid into court generally on the whole declaration. Evidence having been given of some general average, the plaintiff, in order to entitle himself to recover for a total and also a partial loss from stranding, alleged by him, relied on the payment of money into court as an admission, as well of a total loss as of the loss by stranding: but it was held, that as the partial loss might, consistently with the declaration, accrue by another alleged cause, viz. as a general average, the plaintiff could not apply the payment of the court to the stranding exclusively: *Gibbs* C. J. adding, "the court will not be extremely cautious strictly to tie down the parties to the effect of a payment into court, when it is to prevent their trying their right." *Cox v. Parry* (c) was an action on a policy, in which the defendant had paid money into court generally, and had he not done so, the plaintiffs must have been nonsuited for illegality in the policy; and *Ashurst* J. in delivering the judgment of the court, said, as the defendant had paid

(a) 2 Bing. 377, 9 B. M. 724, 729. S. C.

(b) 7 Taunt. 450.

(c) 1 T. R. 465.

money into court, he has thereby admitted that the plaintiffs are entitled to maintain their action on the policy to the amount of that sum. But he has admitted nothing more. He does not, by paying money into court, vary the construction and import of the policy, so as to entitle the plaintiffs to recover beyond that extent." *Long v. Greville* (a) was assumpsit for goods sold and delivered, and on the common money counts. Pleas, non-assumpsit, and the statute of limitations. The claim was for several dinners at an hotel, and for small sums expended on account of the defendant. A sum had been paid into court generally. The court held that that payment had not the effect of excluding the defendant from the benefit of the statute of limitations, saying, "where money is paid in on a declaration setting forth a special contract, that is admitted as alleged; but in no case has the effect gone beyond admitting that the sum paid in is due. Here no special contract was set out; the declaration only stated that so much money was due. The payment into court was equivalent to saying so much is due and no more. You cannot from such a negative imply an affirmative. The plaintiff, therefore, with respect to the rest of his demand, was in precisely the same situation as if that sum had not been paid in." In *Stoveld v. Brewin* (a), the action was on a special contract, by which the plaintiff had sold the defendant a quantity of oak bark, at the average price of the season, to be ascertained before a given day. The declaration averred, that before that day the average price was ascertained to be a given sum, and the court said that payment of money into court generally on the whole declaration, admitted only a cause of action on each count, and a breach with something due thereon, but

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(a) 3 B. & Cr. 10.

(b) 2 B. & Ald. 116.

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not the amount of the breach there stated; "for the defendant, when he pays the money into court, expressly contends that the breach does not extend beyond the sum so paid in. Here the defendants have admitted that an average was struck, but not the amount of that average."

Goulburn Serjt. for the plaintiff, (*Curwood* with him). As no evidence was given of any authority by the plaintiff to expend money in opposing *Worts's* discharge, the finding of the jury on that head cannot be supported.

As to the rest, the payment into court admits conclusively the existence of every contract as pleaded in every count, and the breach of it as there laid. The plaintiff proves damage to have been sustained beyond the amount paid in, and the defendant clearly shows by the accounts put in, and his particulars of set-off, that the 9*l.* 5*s.* 6*d.* was paid in for the plaintiff's share of the expenses in pursuing *Worts*, and not to meet the breaches of contract laid in the first and fourth special counts. The facts do not furnish sufficient premises for the defendant's argument, but in *Bennett v. Francis* (a), Lord *Alvanley*, after canvassing *Cox v. Parry*, *Gutteridge v. Smith* (b), and *Ribbons v. Crickett* (c), as well as Lord *Kenyon's* opinion as expressed in *Baillie v. Cazalet* (d), declared the opinion of the court of C. P. to be, that a payment into court on the whole declaration is an admission of a contract on every count, in every transaction on which such a

(a) 2 B. & P. 550 and 555.

(b) 2 H. Bla. 374, M. 1794, where *Heath J.* inclines to fix the origin of payment into court about the beginning of the 18th century, when 4 & 5 Ann, c. 16. s. 13. passed.

(c) 1 H. Bla. 264; see also *Watkins v. Towers*, 2 T. R. 275; *Andrews v. Palgrave*, 9 East, 325.

(d) 4 T. R. 579, H. 1792.

contract can arise. The earlier cases are fully borne out by *Bulwer v. Horne*, which closely resembles this case, for there is here no count to which any separate or excepted transaction between the parties could apply. [*Parke B.* It is clear on the accounts, that the 9*l.* 5*s.* 6*d.* was paid into court, not for money paid by the defendant for journies after *Worts*, but as a balance of sums received by the defendant on all his other transactions for the plaintiff, and due to the plaintiff after the first item of set-off, viz. 110*l.* 5*s.* for *Worts*'s bad debt had been disposed of aliunde.] The amount due on each count is clearly disputable, and if the payment into court was made on account of a supposed balance, the plaintiff has shown a larger damage to have accrued on the first and fourth counts. By paying money into court the defendant has admitted that he guarantied *Worts*'s debt, and the plaintiff has a right to apply the payment into court to that count or to the fourth, averring a negligent sale to *Worts*. Taking the case as if defendant had suffered judgment by default as to several counts, then on a writ of inquiry the plaintiff would be entitled to enter a verdict for flour furnished to *Worts*.

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PARKE B.—This action is not brought on a particular contract, nor is it so confined even by the particulars of demand, but arose on a variety of transactions between the parties. The payment of money into court generally admits some contract on every count, but that only, and the plaintiff has no more right to apply such payment to one count than to another, for it applies generally. As to the first count, the defendant might say, I did not guarantie the plaintiff for the produce of the sale to *Worts*, and desire that so much of that claim may be struck out of the declaration. Nor is there any thing to estop him from applying the payment to the

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damage incurred by the transaction in the first or other count. Then the difficulty arises, that it was never made a question at the trial what amount of damage the plaintiff had sustained, supposing the defendant to be only responsible on the fourth count, viz. for a negligent sale on credit to *Worts*, being an insolvent person. The best course will be for the plaintiff to confine his verdict to the balance of 20*l.* 3*s.* 4*d.* on the count for goods sold. As no evidence was given that the opposition to *Worts*'s discharge by the insolvent court took place with plaintiff's sanction, he cannot be liable for the costs of that proceeding. The 9*l.* 5*s.* 6*d.* paid into court must not be deducted from the 20*l.* 3*s.* 4*d.*

ALDERSON B.—In *Bulwer v. Horne* no other effect could be given to the payment of money into court than its admitting the special contract. It does not appear to what specific goods the first count applied.

Goulburn Serjt. then showed cause against the rule for a nonsuit. The defendant had admitted that he had received goods from the plaintiff, was bound to take care of them, and had sold them to *Worts*, an insolvent. It was argued at the trial, that if this court should think that the defendant was not authorized by the plaintiff to oppose the insolvent's discharge, the plaintiff should be at liberty to enter a verdict for the expenses incurred in that opposition.

PARKE B.—Taking the case as it stood when it was closed for the plaintiff, there was a case to go to the jury for 20*l.* 3*s.* 4*d.* which the account admitted to be due. Then how could he have been nonsuited without the defendant going into his whole case to prove the actual payment to *Barnett & Co.* by the plaintiff's order? But admitting that payment to be established

by the particulars as contended, the payment into court was also in evidence, which admitted a damage by negligence in selling to *Worts*, and afforded a case to go to the jury, whether the damages accruing from the breach of contract admitted in the fourth count amounted to more than the sum paid in.

BOLLAND and GURNEY Bs. concurred.

Rule for entering nonsuit discharged.

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RAVENS CROFT *against* WISE and three Others.

INDEBITATUS assumpsit for wages due from the defendants, who were owners of the brig *Indian*, to the plaintiff as captain of that ship, and on their retainer. There were counts also for work and labour, money paid, &c. and on an account stated. Plea: general issue, with notice of set-off. Money was paid into court by all the defendants on the whole declaration. At the trial at the Spring assizes for *Cheshire* before Bolland B. the plaintiff put in an agreement signed *Anderson, Wise & Co.*, and proved it to be in the handwriting of *Wise*, who was one of the defendants. By the agreement, which was without date, the plaintiff

plaintiff was engaged as master of a ship for a voyage of three years certain, at yearly wages. He proved that he served accordingly, and then put in the rule to pay a sum into court not amounting to one year's wages. The defendants having objected that the plaintiff must be nonsuited for want of proving all the defendants to be liable, showed that one of them was neither a member of the firm of *A. W. & Co.*, or an owner of the ship which the plaintiff commanded. They then produced the ship accounts rendered to them by the plaintiff, in which they sought to set off against his demand the items with which he had credited them, and to prevent him from recovering against them as for money paid on account of the ship, certain medical and other disbursements there charged to the ship. Held, that under the circumstances, the whole demand of the plaintiff, though consisting of distinct items, was referable to one contract, and that consequently payment of money into court by the four defendants being referable to that contract only, admitted it to be made by the four defendants, so as to hinder them from setting up as a defence, that one of them was not a party to it.

A master of a ship sued four defendants in indebitatus assumpsit, for wages and money paid. All four paid money into court. At the trial the plaintiff proved an agreement written by *W.* one of the defendants, signed *A. W. & Co.*, by which the

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was to command the brig *Indian*, for a voyage of three years certain, at the yearly wages of 100*l.* with certain allowances. It was proved that he commanded the ship on the voyage in question, and had commanded her several years before; on returning home he was dismissed by a letter from *Wise, Anderson & Co.*, which was produced. A rule for payment of 61*l.* into court by the four individuals sued, (*viz. Wise, Anderson, D. S. Wylie and S. Wylie*,) was next proved. It was then contended, that the plaintiff must be nonsuited for want of identifying as partners, the four persons sought to be made jointly liable as such; and that the rule for payment of money into court on counts in *indebitatus assumpsit* was not even *prima facie* evidence of that liability, or of more than admitting the sum paid in to be due and owing. For the plaintiff it was answered, that the payment into court could only apply to the single contract proved. The learned baron having given leave to move to enter a nonsuit on that point, the defendants proved that neither at the time the contract was made or afterwards was the defendant *D. S. Wylie* a partner, and that he had ceased to be a registered owner of the ship before the plaintiff first commanded her. A verdict was then taken for the plaintiff, subject to a reference of the items of the set-off, which were the disbursements made by the plaintiff on account of the ship *Indian* during a long trading voyage stated in his accounts, which also acknowledged sums as due to the defendants.

A rule having been obtained according to the leave reserved,

Crompton and Lloyd showed cause. The fact that the four defendants have paid money into court, on a count charging them as jointly liable to the plaintiff for wages, as master of a ship on their retainer, conclusively proved their liability to this plaintiff under such

retainer, particularly when coupled with that of the plaintiffs' service in that ship, under an agreement written by *Wise*, in the name of *Anderson, Wise & Co.* *Seaton v. Benedict* (a) will be cited to show that in the abstract, payment of money into court on a count in general indebitatus assumpsit does not admit a contract beyond the amount of the sum paid in. But the subsequent case of *Walker v. Rawson* (b), is more in point with the present. There the work sued for having been all done under one contract, the defence was, that the contract was made with plaintiff, and also with one *Burgess*, who did not sue. For the plaintiff it was answered, that the payment of money into court was an admission of his being liable to the plaintiff on the record, and *Seaton v. Benedict* was cited; but *Tindal C. J.* said, "The present case is different from that cited. There the action was but to recover the price of goods supplied to the defendant's wife; each article might there be treated as the subject of a separate contract, and the payment of money might therefore admit a liability as to some articles and leave others disputed. But here, if the defendant is liable in respect of any of the work done, he is liable in respect of the whole of the work, for the contract was one; and the only question is, whether it was made with the plaintiff alone, or with the plaintiff and *Burgess* jointly. Now the defendant being sued by the plaintiff alone pays money into court, and thereby admits that he is content to treat the contract as made with the plaintiff only. Therefore I shall certainly not nonsuit the plaintiff, but will give leave to the defendant to move." No motion, however, was afterwards made. In this case too many persons are made defendants, while in *Walker v. Rawson*, a party who ought to have been

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(a) 5 Bing. 28.

(b) 1 Mood. & Rob. C. N. P. 250.

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made a plaintiff was not included as such. In principle they do not differ. The true rule is, that payment of money into court is conclusive evidence of every thing that would have been necessary for the plaintiff to prove in order to recover the sum paid in; and in a case like the present of a single contract, to which alone the payment into court can be referred, it has the effect of admitting that contract, whether the declaration be in form in *indebitatus assumpsit* or not. This was a case of a single contract, the question being, what sums were to be allowed the plaintiff as captain, and what the defendants were entitled to strike out of his accounts. [Lord *Lyndhurst* C. B. I understand the effect of payment of money into court to be, that it only admits a certain sum to be due by the defendant to the plaintiff, on the contract set out by him. If there be but one contract it must apply to that. Here all the charges were made and all the duties and expenditure arose out of one contract.] Though passages are to be found in modern cases in which the effect of payment into court on an *indebitatus* count is spoken of as different from a like payment on a count on a special contract, they all occur in cases where the allegation of contract in the count has appeared on the evidence to be not entire, but divisible. Either state of things is consistent with the form of *indebitatus* counts, and if it appear in evidence that different items are sued for under different contracts, payment into court as to some will not admit the rest; but if the cause of action is shown to have arisen under one entire contract only, the payment of money into court admits it conclusively, *Bulwer v. Horne* (a); though the circumstances of a case may be considered to see whether there is only one entire contract, or whether it is divisible, *Meager v. Smith* (b). In *Seaton v. Benedict* (c), it appeared in

(a) 4 B. & Adol. 132.

(b) 4 B. & Adol. 673.

(c) 5 Bing. 28.

evidence, that some of the goods supplied were suitable to the condition of the defendant's wife and others not. It would have been most unjust if payment of money into court by the defendant, for the articles for which he was liable, had compelled him to pay for those for which his wife, as his agent, had not authority to bind him. *Long v. Greville* (a) is also an instance where the allegation in the count was divisible, as one part of the demand under the general count might be barred by the statute of limitations, and the other not. Here the court called on

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John Evans and *J. Jervis* to support the rule. As the plaintiff must have been nonsuited had no payment into court taken place, it will follow from the argument on the other side, that if, in an action against several for work and labour and money paid, any sum is paid into court by the attorney for all the defendants, proof of a contract with one will fix the rest who never contracted. But the effect of payment of money into court is only to acknowledge the plaintiff's right of action to the extent of the sum brought in, and does not preclude the defendant from an objection to the surplus part of the demand to which the payment does not apply. The form of the rule shows that when money is brought into court, unless the plaintiff will accept it with costs in discharge of the suit, it is to be struck out of the declaration, *Stoddart v. Johnson* (b); to which *Tidd* (c) adds, that it is also considered as paid before action brought, and so struck out. Had the sum paid in been struck out of the declaration, the plaintiff must have proved more to have been due from all the defendants. In *Meager v. Smith* (d), *Parke J.*, after saying there is no doubt that payment of money into

(a) 3 B. & Cr. 10.

(b) 3 T. R. 637. Per Buller J.

(c) 9th ed. 624.

(d) 4 B. & Adol. 673.

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court made on a count alleging a special contract, operates as an admission of that contract, proceeds: "If on a general indebitatus count for work and labour, or the like, for which the plaintiff might recover on one or more distinct contracts, it operates as an admission of a liability to that amount on some one or more of such contracts; its effect in both cases is the same as if a payment had been made by the defendant to the plaintiff of the like sum before action brought." That would certainly only conclude the party to that amount. In *Mellish v. Allnutt* (a) it was held, that payment of money into court generally upon a declaration containing a count on a policy of assurance and the money counts, is only an admission of the contract, but does not preclude the defendant from disputing his liability beyond such payment for goods not loaded according to the terms of the policy. [Lord *Lyndhurst* C. B. The difference between a payment to a plaintiff before action brought and a payment into court, is, that while the first is only *prima facie* evidence, the latter is conclusive.] In *Blackburn v. Scholes and another* (b), 5*l.* was paid into court in an action of indebitatus *assumpsit*, for goods sold and delivered. Before any payment into court the particular of demand had stated, that the action was brought for the price of ninety-four bags of cotton wool, sold for the plaintiff to the defendants by *K. & Son* on a day named. It was proved that on that day *K. & Son* sold such a quantity of goods to the defendants in one lot. It being objected that the plaintiff's property in the goods must be shown, the plaintiff's counsel contended that it was admitted by the payment of money into court; and it was said, that the goods were all sold at one time, and that the defendants could not, after paying

(a) 2 M. & S. 106.

(b) 2 Camp. 341.

money into court, dispute the property being in the plaintiff. For the defendant the distinction between such a payment on a special and a general count was taken, and Lord *Ellenborough* held that the plaintiff was bound to prove the goods to be his property. Then the defendant may on the general count show a complete answer to the action, notwithstanding the payment of money into court. [Lord *Lyndhurst* C. B. In that case *K. & Son*, the brokers, sold the lot of goods in their own names, and as it did not follow that all which they sold in that lot was the property of the same person, their payment of money into court did not admit the plaintiff to be the owner of the whole.] The defendants' contention at the trial was not against the plaintiff's wages, which were allowed and settled on account, but that he as captain ought not to be allowed in account with his owners for various items of disbursements, during a very long voyage, for medical aid to the seamen, and for some other matters. Now as the defendants might be liable for some and not for others, they had a right to dispute the latter. [Lord *Lyndhurst* C. B. The payment of money into court generally is divisible, as it may be made on many different contracts. Here the plaintiff was captain of a ship on a long voyage, during which he paid the crew, and made disbursements on account of the ship, which happened to arise from his duties as captain under his agreement with the defendants; all his payments are referable to that contract, and to his duty resulting from it. If they were not made on that contract, he could not recover against any of the parties. Suppose a man whom I employ to do work splits his demand into a hundred items, they are all included under the single contract with me, though, with regard to the persons he may employ, his disbursements may be various. The distinction appears to me to be

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obvious, and to have been made at the trial. Payment of money into court does not admit the defendants' general liability in every way. It admits their general liability on or in respect of this contract on which the disbursements were made. *Alderson* B. It admits that the sum paid in is rightfully in the declaration at the time it is made, on account of some contract between the parties; now there being here but one, it can only be referred to that.] That is treating the case as if a special contract was declared on, whereas the contract proved related merely to the plaintiff's services as captain, and not to any expenditure by him as such. [Lord *Lyndhurst* C. B. If I hire a man as captain of my ship without saying more, it becomes part of my contract to pay him all the money he shall as such properly lay out on my account.] In *Long v. Greville* (a), payment into court was held not to shut out a special defence under the statute of limitations, the court saying "Here no special contract is set out. The declaration only stated that so much money was due. The payment into court was equivalent to saying so much is due and no more." [Lord *Lyndhurst* C. B. In that case there were several contracts. The original contract of retainer here binds the whole disbursements together, and shows the contract to be single. The question here is, whether any of the defendants was bound to pay under this contract? for if one was, all were, all having paid money into court; and none being bound by any thing if not referable to this agreement. Possibly none of them may be bound by it. The agreement is for all proper disbursements in his duty as captain; the question of their propriety or the reverse is on the merits.] In *Meager v. Smith* (b), the con-

(a) 3 B. & Cr. 10. *Indebitatus assumpsit* for goods sold and delivered, with the money counts.

(b) 4 B. & Adol. 673.

tract for repairs was single, but the court thought the defendant not concluded as to his total liability by a general payment of money into court on a declaration consisting of indebitatus counts only. [Lord *Lyndhurst* C. B. By employing the same attorney and defending jointly by him, all the defendants, including *D. S. Wylie*, joined in paying the money into court. His defence now is, that he is not liable, and had he severed in his defence from his co-defendants they could not have paid in the money (a).] They also cited the judgment of *Ashurst J.* in *Cox v. Parry* (b).

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Lord LYNDHURST having left the court,

BOLLAND B. stated the facts, and then proceeded thus: This is a motion to enter a nonsuit. For the defendants it is objected, that payment of money into court on an indebitatus count, does not bind the defendants further than the amount of the money so paid in, and therefore does not show them to be liable to the plaintiff, otherwise than on such a contract as he shall establish by other proof at the trial. It appeared to me at the trial, as it does now, that this was one entire contract made between the defendants as owners on the one side, and the plaintiff as captain on the other, for a long voyage. There is no item in the plaintiff's demand which does not appertain to the duty to be performed by him as captain, viz. for wages due to him as such, and for disbursements alleged to be made by him in the same character during the voyage, on account of the ship and for her sick crew. The only question in contest at the trial was, whether the owners were liable to pay those disbursements, or whether the captain had not, by making them impro-

(a) See *Kay v. Panchiman and others*, 2 W. Bla. 1029.

(b) 1 T. R. 465.

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vidently, deprived himself of remedy against the owners for repayment. The whole matter in dispute was referable to one contract, and by paying money into court, the defendants have admitted themselves parties to it. The present rule must therefore be discharged.

ALDERSON B.—Directly it appeared in proof that there was in fact but one contract between the parties, the payment of money into court admitted that the plaintiff was entitled to recover against all the defendants as parties to that contract. That proof placed the plaintiff in the same situation on the general counts as if he had stated the contract specially in the declaration, and had averred that certain work had been done and money paid by him under it. In that case the contract would have been admitted by the payment into court, leaving it open to the defendants to dispute whether more was due under it than the sum paid in. The answer of the jury to the judge's question in *Meager v. Smith*, is not to be taken as the ground on which their verdict proceeded, or the case would be an authority in favour of these defendants.

GURNEY B.—The case set up at the trial by the defendants, that they were not jointly liable, was inconsistent with their previous payment of money into court.

Rule discharged.

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ALIVON and Another, Provisional Syndics of the Estate and Effects of BEUVAIN a Bankrupt, *against* FURNIVAL.

DEBT. The *third* count of the declaration stated, that before *Peter Beuvain* became a bankrupt, to wit, on &c., in parts beyond the seas, to wit, at &c., by a certain instrument in writing then and there made between the defendant of the one part, and the said *P. Beuvain* of the other part, the said parties made and concluded a certain agreement; and in the same instrument it was agreed between the said parties, that

On *A.* and *B.* entering into an agreement in *France*, a copy of it was deposited by *A.* with a notary at *Paris*. In an action against *B.* on the agreement, evidence was given, that by the usage of *France*, a document deposited with a notary cannot be removed:—Held, that the agreement was sufficiently proved, by production of a copy of the document so deposited; there being no satisfactory evidence of the fact, that two duplicate originals had been made.

By agreement between *A.* and *B.* made in *France*, any disputes which might arise between them, were to be submitted by them to two arbitrators, merchants, [*negotiants*] respectively named by them, who in case of disagreement were to have power to name an umpire. The two or the three referees might also be named by a particular court, at the request of either party:—Held, that that court might appoint an arbitrator, who was not a merchant; and also, that an act by which it annulled *B.*'s nomination of an arbitrator, on the ground that he was a foreigner, and appointed not two other arbitrators, but one, a *Frenchman* and not a merchant, to act as referee with the nominee of *A.*, must be taken to be legal according to the *French* law, till the contrary was distinctly proved.

Where on breach of an agreement entered into in *France*, and to be performed there, *French* arbitrators awarded a sum, including the profits which the plaintiff would have made had the agreement been fulfilled:—Held, that that sum might be recovered in an action here on the award, as not being shown to be contrary to *French* law.

It was deposed, that two out of three provisional syndics may, by the law of *France*, sue to recover debts due to the bankrupt, and without the previous authority of the *Juge Commissaire*:—Held, that they may so sue in this country, unless the *French* law be shown to the contrary:—Held also, that the act of the two syndics sufficiently implied the absence or want of consent of the third, without showing his absence or want of consent.

Evidence was given, that by *French* law two out of three provisional syndics may sue for the debts due to the bankrupt, and no contradiction being offered:—Held, that they may so sue in this country.


The declaration averred, that a party, a *Frenchman*, was a bankrupt. The evidence was, that he was only “*en etat de faillite*” or insolvent:—Held no variance, as the *English* “bankrupt” does not appear identical with the *French* “*banqueroute*.”

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in case of disputes the parties recognized the jurisdiction of a certain court, to wit, of the tribunal of commerce sitting at *Paris*, in the department of the *Seine*; and they thereby submitted the matters in difference to the decision of two arbitrators, being merchants, to be named by the parties respectively, such arbitrators, in case of disagreement, to have the power of naming an umpire; and that the two or the three arbitrators might be named by the tribunal of commerce at the request of either of the said parties; and that the decision of such arbitrators or their umpire was to be supreme, and without appeal. And the plaintiffs in fact say, that after the making of the same instrument, and before the said *P. Beuvain* became a bankrupt, to wit, on &c., at &c., such disputes as were mentioned and contemplated in and by the same instrument, arose and were depending between the said *P. Beuvain* and the defendant. And thereupon afterwards, and before the said *P. Beuvain* became a bankrupt, to wit, on &c., at &c., the said *P. Beuvain* duly, according to the laws of *France*, impleaded the said defendant in the said court in the same instrument in that behalf mentioned, that is to say, in the tribunal of commerce, in the department of the *Seine*, and then and there duly, according to the laws of *France*, prayed and required that arbitrators should be appointed by the said court, in pursuance of and according to the provision so as aforesaid contained in the same instrument. And the plaintiffs in fact further say, that afterwards, and before the said *P. Beuvain* became bankrupt, to wit, on &c., parties were duly, according to the laws of *France*, appointed in and by the said last-mentioned court, to decide the said dispute, as by the said appointment duly according to the laws of *France*, and the course and practice of the same court, and still

remaining therein, will more fully appear. And the plaintiffs further say, that afterwards and before the said *P. Beuvain* became a bankrupt, to wit, on &c. at &c. the said arbitrators having heard the allegations and proofs of the said parties respectively, duly made their certain award, called an arbitral sentence, of and concerning the said disputes so referred to them as aforesaid; and did thereby award and order, that the defendant should pay to the said *P. Beuvain* two several sums of foreign money, to wit, the sum of 51,589 francs, 50 centimes, and the sum of 157,819 francs, 68 centimes, making together the sum of 209,409 francs, 18 centimes, as by the same arbitral sentence duly, according to the law of *France*, and the course and practice of the said court, now remaining in the same court, will more fully appear. And that afterwards and before the said *P. Beuvain* became a bankrupt, to wit, on &c., by a certain ordinance duly, according to the law of *France*, made at *Paris* aforesaid, to wit, at &c., the president of a certain court in the kingdom of *France* aforesaid, to wit, the president of the civil tribunal of first instance, in the department of the *Seine*, further declared and ordered, that the same arbitral sentence should be executed in all its particulars, according to its form and contents, as by the same ordinance duly, according to the law of *France*, and the course and practice of the last-mentioned court, registered in the same court; and now remaining therein, will more fully appear. And that the said *P. Beuvain*, after the giving and making of the same judgment and arbitral sentence and ordinance, and before the giving and registering of a certain judgment hereinafter mentioned, to wit, on &c. at &c. became and was a bankrupt according to the laws of *France*, and the said plaintiffs were then and there duly appointed, and then and there became and were

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and still are provisional syndics of the estate and effects of the said *P. Beuvain*, according to the law of *France*. Whereupon and whereby the plaintiffs, as such provisional syndics as aforesaid, according to the law of *France*, became and were, and still are entitled and empowered in their own names to sue for and recover all debts which were due to the said *P. Beuvain*, at the time the said *P. Beuvain* became bankrupt; and entitled to enforce by action in their own names, as such provisional syndics as aforesaid, all claims and demands which the said *P. Beuvain*, at the time he so became bankrupt as aforesaid, had or might have against the defendant. And that the said cause was afterwards, to wit, on &c., removed by the defendant into a certain other court in the kingdom of *France* aforesaid, to wit, a certain court called the Royal Court of *Paris*, by way of appeal; and such proceedings were thereupon afterwards had in the said last-mentioned court, that by the judgment of the same court, pronounced on the day and year aforesaid, after setting forth therein as the fact was, that the plaintiffs, as such provisional syndics as aforesaid, had been made parties in the said cause in the room of the said *P. Beuvain*; the appeal of the defendant was dismissed, and the defendant was condemned to pay a fine, and the expenses of the appeal, as by the same judgment duly, according to the law of *France*, and the course and practice of the said last-mentioned court, still remaining therein, will more fully appear. Which several judgments, arbitral sentence, and ordinance, still remain in their full force and effect, not in anywise reversed, annulled, set aside, paid off, satisfied, or discharged. And the plaintiffs further say, that the said sum of 209,409 francs, 18 centimes, at the time of the giving and making the said several judgments, arbitral sentence, and ordinance, was and still

is of great value, to wit, of the value of 8,200*l*. Of which said several premises respectively, the defendant, during all the time aforesaid, there had notice: Yet &c. Plea: nil debet.

A commission issued for the examination of witnesses was executed at *Paris*. The original agreement in the *French* language, deposited with a notary, was produced before the commissioners, and the signatures of *Beuvain* and the defendant were proved by *Albert* the attesting witness, who stated in the course of his examination, that according to the law of *France*, a notary with whom an original agreement has been deposited, cannot part with it, except by the directions of a *French* court (*a*). The agreement was expressed to be “fait au double.” An examined copy, verified by the same witness, was returned by the commissioners. A copy of the original award, subscribed by the arbitrators, was proved by the persons who had examined it with the original, (which it appeared was deposited in the “Tribunal de premiere instance,”) and also returned by the commissioners; and evidence was given of the fact, that *Beuvain* was a merchant, that he was in debt, and that he had stopped payment (*b*).

The cause was tried before Mr. Baron *Vaughan*, at the *Middlesex* sittings after *Trinity* term 1833; the depositions taken under the commission, and the papers returned therewith, were read. Official copies verified by the seals impressed thereon, and proved to be those of the respective courts, were put in, to show the judgment of the tribunal of commerce appointing arbitrators named by the parties: another judgment of

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(a) “ Les notaires ne pourront se dessaisir d'aucune minute, si ce n'est dans les cas prévus par la loi, et en vertu d'un jugement.” Loi du 25 Ventose an 11. Sur le Notariat, tit. 1. sec. 2. pl. 22. Appendice aux Codes.

(b) See Code de Commerce, Art. 437.

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that court, removing the arbitrator named by *Furnival*, on the ground that he was a foreigner, and appointing, on *Furnival's* default, a new arbitrator; a judgment of the royal court, confirming on appeal the latter judgment; another judgment of the tribunal of commerce, extending the time for making the award; another judgment of the royal court, confirming the latter judgment on appeal, and further extending the time, the ordinance; another judgment of the tribunal of commerce, declaring *Beuvain* to be "en etat de faillite;" another judgment of the same court, appointing the plaintiffs, and one *Chatounay*, provisional syndics, with power "agir ensemble ou séparément, l'un en cas d'empêchement, ou d'absence de l'autre, sous la surveillance de *M. le Juge commissaire*;" and another judgment of the royal court, confirming the ordinance, on appeal to which the plaintiffs and *Chatounay* were therein expressed to be made parties as provisional syndics, in the place of *Beuvain*.

M. Colin, a *French* advocate, examined for the plaintiffs, stated, that according to the law and practice in *France*, one or two of three named syndics may sue without proving the disability of the rest, or the authority of the juge commissaire, and deposed to the usage in *France* on various points of evidence. A *French* notary, who was examined for the defendant, stated, that syndics could not bring an action unless authorized by the juge commissaire, and said he did not suppose that a solicitor in *France* would bring an action for syndics, unless the authority of the juge commissaire had been obtained.

The defendant's counsel took a great variety of objections, the nature of which will appear in the course of the argument. The plaintiffs were nonsuited. A rule nisi having been obtained, pursuant to

leave reserved at the trial, to set aside the nonsuit, and enter a verdict for the plaintiffs for 8,200*l*.

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Follett and *Tomlinson* showed cause.—First, this is an action on an award, but the agreement on which the award is founded, has not been sufficiently proved. The plaintiffs have offered as evidence a copy deposited with the notary ; but he should have attended the trial with the duplicate original. For the agreement is expressed to be “*fait en double*”, and the *Code Civile*, Art. 1325, invalidates acts containing agreements, except the number of originals made is equal to that of the parties who have distinct interests ; but the plaintiffs have neither accounted for *Beuvain's* duplicate original, nor given the defendant notice to produce his.

Secondly, the award cannot be enforced, the arbitrators not having been duly appointed. By article 12 of the agreement (*a*), they were to be merchants, respectively nominated by the parties. The arbitrator nominated by the defendant was a merchant, but was set aside by the *Tribunal de Commerce*, who appointed another in his place, to act with the arbitrator named by *Beuvain*. There was no evidence, that by the law of France, the *Tribunal* had power to set aside the defendant's nominee because he was a foreign merchant, and unless it had the award cannot be enforced here. [*Parke B.* Though it does not appear on what principle the *Cour Royale* confirmed the award on ap-

(a) Article 12 was as follows :—“ En cas de discussions, les parties reconnaissent la juridiction du tribunal de commerce séant à Paris, Département de la Seine, et elles seront soumises à deux arbitres négts [negotians] respectivement nommés par elles, qui, en cas de désaccord, auront la faculté de nommer un troisième pour les départager ; les deux ou les trois arbitres pourroit également être nommés par le dit Tribunal de Commerce, à la requisition de l'une des parties ; et la décision d'accord ou celle du partage sera souverain et sans recours en appel.”

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peal, their judgment is itself evidence, that by the law of *France* the award was right.] The decision on the appeal was in favour of the judgment of the *Tribunal de Commerce*, but did not decide at all on their right to annul the defendant's appointment of an arbitrator, and to appoint another on their own authority. The act of annulment itself is no evidence of their courts' authority to do so. The judgments of Lord *Tenterden* and the other judges, in *Henley v. Soper* (a), show that where an award is disturbed by a court, which directs a new investigation, the consent of the party to a second reference must be shown. Here no such consent appears, and the arbitrator substituted by the court was not a merchant. The *Tribunal* has neither exercised its powers of appointing both arbitrators, or followed the nomination made by the parties. It professes to appoint an arbitrator for the defendant under the agreement, and not pursuant to the law of *France*. The award was made by *Beuvain's* nominee, and another, who was proved not to be a merchant, nominated by the *Tribunal*, without the defendant's consent.

Thirdly, The award is bad, as the arbitrators have exceeded their authority, in awarding to *Beuvain* not only the exclusive use of the patent in question throughout all *France*, but also to pay 157,819 francs, 68 centimes, a sum the result of calculating the expected profits for 15 years; nothing in the agreement authorizes that. The judgment of the *Cour Royale*, affirming the award, did not decide the question, whether per se the award was valid or not by the law of *France*. It affords only *prima facie* evidence on that question, which is still open to dispute on the merits. [*Parke B.* The decision in *Martin v. Nicolls* (b), was well considered.] That was an application for the extraordinary aid of the court of Chancery,

(a) 8 B. & Cr. 16.

(b) 3 Sim. 458.

to impeach the judgment of a court at *Antigua*, and it was observed, that the parties might appeal to the king in council. *Eyre C. J.* in *Philips v. Hunter* (a), there referred to by the vice-chancellor, said, the judgments of foreign courts might be examined. In this case the *French* courts have not adjudicated on the merits at all. The ordinance merely renders the award executory (b), and is merely formal. Like the making an agreement of reference a rule of court, for the purpose of issuing an attachment, it does not exclude objections to the award itself. The judgment of the *Cour Royale* rejects the appeal from the ordinance, expressly on the ground that the questions raised on the award are matters of a primary nature, and therefore not the subject-matter of appeal. The *Cour Royale* does not affirm the validity of the award by the *French* law; nor is evidence given that the arbitrators decided consistently with *French* law, while their award appears contrary to all natural justice.

Fourthly, It has not been proved that the plaintiffs, who are described as "provisional syndics," and by their appointment are to act "sous la surveillance de *M. le Juge commissaire*," had his authority to sue, without which, by the law of *France*, they could not sue in *French* courts to recover a debt (c). The evidence of *M. Colin* does not distinctly disprove the necessity for proving that authority to sue in these cases in *France*, and is inconsistent with the language of the appointment and of the law, besides being contradicted by the defendant's witness, *M. Gerard*. *Tenon v. Mars* (d) is an authority to show that the plaintiffs should have shown their right to sue by the law of *France*. Were that otherwise, defendants might

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(a) 2 H. Bl. 402, 410.

(b) Code de Procedure Civile, Arts. 1020, 1021.

(c) Code de Commerce, Arts. 482, 492, 451;

(d) 8 B. & Cr. 638.

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be put to great expense, by being sued in this country without due grounds. The action is brought by two out of the three provisional syndics appointed. It is true they were in terms empowered to act "ensemble ou séparément, l'un en cas d'empêchement ou d'absence de l'autre," but no evidence was given of the absence or incapacity of the syndic not joined. Had he been absent or incapable, the action should have been brought in his name and on his behalf, as well as those of the others who represent *Beuvain*. [*Alderson B. In Trimbey v. Vignier (a)*, it was held by the court of C. P., that when the indorsement made in *France* of a *French* bill is general in blank, and the indorsee sues the acceptor in this country, he cannot proceed in his own name, but should sue in that of the indorser, according to the *French Code de Commerce*, articles 136, 137, 138.] So by our law, all the assignees of a bankrupt must join in an action (*b*), as an act done by two out of three is not a due exercise of a power to act jointly or separately (*c*); and these plaintiffs have not pursued the power given them in terms by their appointment.

Fifthly, The evidence does not support the declaration.—The arbitral sentence is stated in the declaration to be in the court of commerce. The evidence shows that it is registered in the court of first instance. The declaration throughout describes *Beuvain* as a *bankrupt*, and the alleged rights of the plaintiffs are therein expressly founded on his bankruptcy. In the event of a merchant stopping payment, the *French* law (*d*) defines three classes of cases, with various incidents peculiar to each, namely "*faillite*," "*banqueroute*

(a) 1 Bing. New Cas. 151.

(b) See *Snelgrove v Hunt*, 2 Stark. C. N. P. 424. N. B. The report of S. C. in 1 Chit. R. 71. states the pleadings, which show the action to have been brought exclusively on a contract made with the "assignees."

(c) Co. Lit. 181 b.

(d) Code de Commerce, Arts. 437, 438, 439.

simple," and "*banqueroute frauduleuse*." The *French* proceedings in evidence show that there was no bankruptcy of either kind, but merely a "*faillite*" and that *Beuvain* was not a bankrupt, but "*failli*."

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Bompas Serjt. Manning, and *J. Henderson* in support of the rule. This is in substance an action on a judgment. It appears from the *French* proceedings that *Beuvain* and the defendant were partners in the transactions out of which these differences grew, and, according to the *French* law (*a*) those differences could be decided only by arbitrators. The power of appeal possessed by the defendant (*b*) was exercised by him, and his appeal was rejected. The ordinance renders the arbitral sentence absolutely executory (*c*), and unless successfully appealed from, conclusive (*d*). It is plain then that the defendant was absolutely bound in *France* by this arbitral judgment, and there being no question as to jurisdiction, no evidence on the part of the defendant impugning that judgment, and no irregularity apparent *ex facie*, it affords *per se* sufficient proof of the rights which it purports to confer. The plaintiffs' case, however, may be sustained without ascribing to the award and ordinance the attributes of a judgment. The production and proof of the original agreement before the commissioners, coupled with the copy given in evidence, afford sufficient establishment of the agreement. It appears that the original is beyond the control of this court, and that it was deposited with the notary for safe custody; and one of the witnesses deposes, that according to the *French* law it cannot be removed out of the notary's office without the authority of a *French* court. It is therefore sufficiently manifest that this original could not be produced before

(a) Code de Commerce, Art. 51.

(b) Id. Art. 52.

(c) Id. Art. 61.

(d) Code de Procedure Civile, 1016.

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the jury. The expression "*fait au double*" discovered in the agreement, is not explained in evidence, and does not necessarily raise the inference attempted to be drawn from it, that there was another part having the same obligatory effect. If such an inference were drawn, it is at least not to be further presumed that one complete original (and the case supposes only two) was delivered to either of the parties who were mutually bound; and the only other presumption, viz. that it remained with the notary, answers the objection by accounting for the other part, and the proof of either part in such case is sufficient.

By the terms of the agreement the parties expressly submitted themselves to the jurisdiction of the court of commerce, and the judgment of that court, which was confirmed on appeal, is sufficient, in the absence at least of any evidence impugning it, to conclude the objection that the arbitrator nominated by the defendant was improperly removed. A sufficient reason is assigned in the judgment for the removal, viz. that the arbitrator nominated by the defendant was not legally qualified to be an "*arbitre juge*," being a foreigner. The defendant not having within the appointed time nominated another arbitrator, the court exercised its power as if he had never appointed an arbitrator. And the power was substantially as well exercised by nominating the arbitrator chosen by *Beuvain*, and a new arbitrator on defendant's default, as it would have been by nominating two new arbitrators.

It is not clearly shown in evidence whether the arbitrator nominated by the court was a merchant, but assuming that he was not, still as the award has been confirmed on appeal, when this objection might have been taken, it must now be presumed, as there is no proof to the contrary, that the court did not in this respect exceed its power. On the agreement it does

not appear that the restriction of choice to merchants imposed on the parties extends to the court of commerce.

The confirmation of the award on appeal sufficiently shows that the award itself is consistent with *French* law, and there is no evidence to the contrary. The award itself is consistent with natural justice. It is needless to inquire as to that part which awards to *Beuvain* the exclusive use of the patent, because the present action is not founded on that part; and even if the award were bad pro tanto, it might be good for the rest. The award of the 51,589 francs, 50 centimes, is founded on proof of an excess to that amount of the expenses over the amount which the defendant by the agreement guaranteed to be the maximum, and that item has never been questioned. With respect to the item of 157,809 francs, 68 centimes, the arbitrators, in awarding it, have construed the agreement as imputing a guarantee that the profits of the undertaking should amount at the least to a certain sum annually during the duration of the agreement, viz. 15 years, and the agreement will fairly bear such a construction. The anticipated profits and the mutual penalties are stated therein at very high rates. *Beuvain*, in case of failure on *his* part, was bound, under article 9. of the agreement, to pay the defendant 20,000 francs a year for 15 years, and thus was contingently liable to the extent of 300,000 francs. The arbitrators, proceeding on the principle of a guarantee of such prospective profits, have calculated damages as they have been calculated in an action in an *English* court, for not granting a lease where the improved value is proved to exceed the rent agreed to be received, viz. by multiplying the profit by the number of years, making a suitable reduction for present payment.

The evidence of *M. Colin* shows that the antecedent authority of the Juge commissaire is not necessary to

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the jury. The expression "*fait au double*" discovered in the agreement, is not explained in evidence, and does not necessarily raise the inference attempted to be drawn from it, that there was another part having the same obligatory effect. If such an inference were drawn, it is at least not to be further presumed that one complete original (and the case supposes only two) was delivered to either of the parties who were mutually bound; and the only other presumption, viz. that it remained with the notary, answers the objection by accounting for the other part, and the proof of either part in such case is sufficient.

By the terms of the agreement the parties expressly submitted themselves to the jurisdiction of the court of commerce, and the judgment of that court, which was confirmed on appeal, is sufficient, in the absence at least of any evidence impugning it, to conclude the objection that the arbitrator nominated by the defendant was improperly removed. A sufficient reason is assigned in the judgment for the removal, viz. that the arbitrator nominated by the defendant was not legally qualified to be an "*arbitre juge*," being a foreigner. The defendant not having within the appointed time nominated another arbitrator, the court exercised its power as if he had never appointed an arbitrator. And the power was substantially as well exercised by nominating the arbitrator chosen by *Beuvain*, and a new arbitrator on defendant's default, as it would have been by nominating two new arbitrators.

It is not clearly shown in evidence whether the arbitrator nominated by the court was a merchant, but assuming that he was not, still as the award has been confirmed on appeal, when this objection might have been taken, it must now be presumed, as there is no proof to the contrary, that the court did not in this respect exceed its power. On the agreement it does

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not appear that the restriction of choice to merchants imposed on the parties extends to the court of commerce.

The confirmation of the award on appeal sufficiently shows that the award itself is consistent with French law, and there is no evidence to the contrary. The award itself is consistent with common justice. It is needless to inquire as to that part which awards to Beron the exclusive use of the patent, because the present action is not founded on that part. And even if the award were not just, it might be good for the rest. The award of the 2,500 francs of damages is founded on proof of an error in that amount of the expenses over the amount which the defendant by the agreement promised to be the maximum. And that item has never been questioned. As to the item of 15,000 francs of damages, the defendant, in awarding it, has undertaken the agreement of guaranteeing a guarantee that the profits of the manufacturing process amount at the least to a certain sum during the duration of the agreement. It is true, and the agreement will fairly pay him the anticipated profits and the value of the invention at very high rates. On his part, was bound, by the agreement, to pay the defendant 15,000 francs for 10 years, and thus was contracted to pay 150,000 francs. The principle of a guarantee of profits is a principle which has been applied in an action in an English court, where the improved value is paid for the number of years, and the present payment.

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the validity of proceedings of the present kind in *France*; and the witness for the defence on this point states in effect no more than his opinion as to the course which a *French* solicitor would pursue. From the *French* proceedings in evidence it may be concluded, that where syndics proceed in the *French* courts against the debtors of the estate, it is unnecessary to allege or prove the authority of the judge commissary. The syndics of *Beuvain* are, in the appeal in the royal court, made parties to the suit in the room of *Beuvain*; yet there is not in any part of the proceedings the slightest allusion to the Juge commissaire. Considering that these *French* records state minutely every incident of the trial, down even to the names and fees of the ushers, the absence of any reference to the Juge commissaire tends directly to show that his authority needed not averment or proof. It might be presumed that the syndics are authorized by him to perform their duty of recovering debts, and the question whether they are so authorized affects only the interests of third persons; the issue to be tried on these pleadings was, whether the money was due to the syndics, not whether the payment ought to be thus enforced. The 1 *Geo.* 4. c. 119. s. 11. enacted, that no suit at law instituted by the assignees of an insolvent should proceed further than arrest on mesne process, without the consent of the major part of the creditors, given at a meeting called for the purpose. Yet it has been held that the defendant in an action brought by the assignees can in no way avail himself of this provision, as it was not made for his benefit, and that the assignees need not in such actions aver or prove their authority to sue; *Doe v. Spencer* (a), *Dance v. Wyatt* (b).

The testimony of *M. Colin*, on this point uncontradicted, clearly shows that in the *French* courts two out of three syndics may sue without alleging or giving

(a) 3 Bing. 204.

(b) 6 Bing. 486.

evidence of the absence or incapacity of the third. In the present case there was indeed such evidence. A witness cross-examined by the defendant's counsel as to a conversation with the plaintiff's agent, deposed on his re-examination, as a further part of the same conversation, which was therefore matter to go to the jury (a), that the agent stated that *Chaturday* (the syndic not joined) was in *Italy*. *M. Colin's* evidence sufficiently supports the allegation in the declaration, that the plaintiffs, according to the law of *France*, are entitled in their own names to sue. The nonjoinder of the third syndic could, at the utmost, only be the subject of a plea in abatement, as in the cases of executors and administrators, the plaintiffs here suing in *autre droit* (b). There is nothing to raise the presumption of any legal obligation to name the third at all, or of any ground for applying to this case the strict rule of English law in the construction of the words "jointly or separately." In *Guthrie v. Armstrong* (c) the court expressed an indisposition to extend that rule, and refused to apply it where there were reasonable grounds for presuming a different intention of the parties. Here there is sufficient ground for such presumption; it is not to be inferred that the court intended that if the number of the syndics capable of acting, should be reduced to two by accident, it should be further reduced to one by the application of a technical rule, which has not been shown to belong to the *French* law.

The averment in the declaration, that the arbitral sentence remains in the court of commerce, is immaterial and may be rejected; *Walker v. Witter* (d).

(a) The Queen's case, 2 Brod. & Bing. 298.

(b) Com. Dig. title Abatement, (E. 13, 14.), (F. 10.), and cases collected, 1 Chitty on Pleading, 4th edit. 12, 13.

(c) 5 Barn. & Ald. 628; and see *Bonifant v. Greenfield*, 4 Mann. & Ryl. 190.

(d) 1 Doug. 1.

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The sworn interpreters on their oaths have rendered the words "failli" and "faillite," by the *English* words, bankrupt and bankruptcy, and there is nothing to impeach their testimony as to the fidelity of the translation. It is evident that the *French* law recognizes three species of bankruptcy, called in *French*, "faillite," "banqueroute simple," and "banqueroute frauduleuse," and the translators have used the generic word. These species do not differ from each other in what relates to the rights and powers of the syndics (a).

*Cur. adv. vult.*

PARKE B. afterwards delivered the judgment of the court as follows:—Many objections were taken in this case to the right of the plaintiff, to recover. It was contended, first, that the agreement was not proved. Secondly, that this was considered as an action on the award only, and that the arbitrators were not duly appointed. Thirdly, that the award was not made pursuant to the submission, and was therefore void. Fourthly, that the plaintiffs had no right to maintain the action. Fifthly, that the declaration was not proved. We have considered these objections, and are of opinion that they are not well founded, and that the rule must be absolute to enter a verdict for the plaintiffs.

The first objection is, that the agreement was not properly proved. This divides itself into two branches; one, that even if there were no evidence of a duplicate original in existence, this proof would not have been sufficient, because the original, deposited with the notary, ought to have been produced, or clear proof given that by the written law of *France* it could not be removed. Another branch of this objection is, that it was proved that there was another original of this

(a) Code de Commerce, Art. 600.

agreement in existence; that the copy was only secondary evidence and not admissible until the original was accounted for, and that no such notice was given.

It seems to be clear that this document was not acknowledged before a notary, and is therefore not to be deemed a notarial act. It was simply deposited for safe custody; but there was sufficient evidence on the testimony of *M. Colin*, that it is the established usage in *France*, though without any provision of the written law, not to allow the removal of documents so deposited, and consequently to let in secondary evidence of the contents, for such evidence is admissible where it is in effect out of the power of a party to produce the original, and that was sufficiently proved in this case to the satisfaction of the learned judge, whose province it was to decide upon this question, and we cannot say that his decision was wrong.

The second branch of this objection is, that there was evidence of the existence of a duplicate original, and that there is an established rule, that all originals must be accounted for before secondary evidence can be given of any one. There is no doubt as to this rule, but we are not satisfied that there was any such duplicate original in this case, which had the same binding force, and effect on the *defendant* as the one deposited and proved; the only evidence of its existence is the expression "*fait double*" at the foot of the agreement; but what is the precise meaning of these terms, or what was the nature of the duplicate executed in this case, if there was one, was not made out by the evidence, and neither in the numerous cross interrogatories (63) exhibited to the witness *Albert*, nor his depositions which were read on the trial, is there one which hints at the existence of any other obligatory document than the one deposited with the notary. It is very true that the 1325th article of the *Code Civile* requires duplicates

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where there are two interests, but I do not see how we can properly take notice of their laws, as it was not proved on the trial. The objection is one *strictissimi juris*, and beside the justice of this case; and we think that it ought not to succeed, unless the existence of a duplicate original, in the proper sense of that word, was more distinctly made out than it was in this case.

I now come to the objections on the merits; and first, as to the appointment of the arbitrators. It is contended, in the first place, that by the express agreement of the parties in article 12, merchants must be appointed, and that the *Tribunal de Commerce* had power to appoint others. This depends upon the construction of that article, [the learned baron here read article 12 of the agreement, *ante*, p. 757]. We do not think that the *Tribunal de Commerce* is restricted by this clause from appointing arbitrators not merchants. The parties are; but the court has a general power, and it is to be remarked that in none of the proceedings in the *French* courts is the objection taken, that the *Tribunal de Commerce* exceeded its powers in this respect. It is then said that the *Tribunal de Commerce* has no power to annul the appointment made by the defendant himself, which they have done by their act of 15th *November* 1827. [The learned baron read it.] Now, by this act, it appears that the appointment of a foreigner as arbitrator was not a due exercise of the power received by the twelfth article, and void, and was the same as if no arbitrator at all had been named by the defendant; and we must assume the judgment of the court to be, according to the *French* law, at least, until the contrary was distinctly proved, according to the principle laid down in *Becquet v. Mac Arthy* (a).

Next, it is contended, that the *Tribunal* ought to have appointed two arbitrators and not one; but is there any

(a) 2 B. & Adol. 957.

substantial difference in allowing the former appointment to stand, naming another, and expressly appointing the arbitrators already named and the other, jointly, *de novo*? certainly there is not; and in this respect also we must assume that the Tribunal de commerce acted according to law, unless the contrary be proved.

The third head of objection is to the award itself, which it is suggested is not warranted by the submission. The award has proceeded upon the principle that *Beuvain*, instead of being merely placed in statu quo, and reimbursed the expenses incurred upon the faith of the contract, (which could have been done by awarding to him as damages the expense of constructing the new works, deducting the value of the materials,) has moreover, under all the circumstances of the case, a right to be placed in the same situation as if the defendant had fulfilled his contract; and it is impossible for me to say that this principle of adjudging the damages is wrong, as being contrary to natural justice, nor is there evidence that it is not conformable to the law of *France*; indeed it appears to follow the rule laid down in the 1149th article of the *Code Civile*.

The fourth head of objection is that the plaintiffs cannot sue; and this objection subdivides itself into several: 1st, that by the terms of the appointment, two out of three cannot sue: (a) [Here the learned baron read the appointment of the arbitrators]. The answer to this objection is, that by the law of *France* in such a case, two out of three may do an act as well as one

(a) The terms of the appointment were as follows:—"Le tribunal nommé pour syndics provisoires de la faillite de sieurs *Beuvain & Co.*, le sieur *Chatonney*, le sieur *Delonstal*, et le sieur *Alivon*, portés en la dite liste, pour exercer les dites fonctions de syndics provisoires, telles qu'elles sont décrites dans les articles 476 à 525 du *Code de Commerce*, lesquels syndics pourront agir ensemble ou séparément, l'un en cas d'empêchement ou d'absence de l'autre, sous la surveillance de M. le Juge Commissaire."

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separately, and that is distinctly proved by *M. Colin*. 2dly, It is said he ought to have the previous authority of the *Juge commissaire*. They are directed by the appointment to act under the *surveillance* of the *Juge commissaire* by article 492 of the *Code de Commerce*, but *M. Colin* proves that they may bring an action without his authority, for that is the effect of his testimony; and though the defendant's witness *Gérard* gave evidence to the contrary, it seems to amount only to this, that a syndic would not act properly in doing so, not that the want of previous directions would avoid the act and constitute a defence to the action; and this is in conformity with the principle in which the cases cited for the plaintiff relating to actions brought by assignees of insolvents in this country were decided. 3dly, It is insisted that by the law of *France*, two cannot maintain an action for the debt due to the bankrupt, and this also depends upon the evidence. That all may sue appears by articles 492 and 499 of the *Code de Commerce*, both given in evidence; that the bankrupt is deprived of the administration of his effects, appears by article 442, also read at the trial; and *M. Colin* deposes that two have the same power to act under this appointment as three, and there is no evidence to the contrary. 4thly, It is insisted that if two can bring an action, it is a condition precedent upon the construction of the instrument of appointment, that the third should be absent, or should have objected to the act done, and that there was no proof of either circumstance in this case; but we are of opinion that this would be to put a very strict construction upon the term of the appointment. It seems to us that the act of two only, sufficiently implies the absence or want of consent of the third, and that the effect of the authority given by the appointment is, in substance, to authorize two to do valid acts as to third persons without the other:


and it was in fact proved that by the law of *France* one of the arbitrators might act if the other two were absent or not consenting, but that they should not so act without the absence of or want of consent of that other.' Lastly, it is said that though two may act and bring an action, yet they must sue in the name of all. Now the effect of the testimony of *M. Colin* is, that two may sue in *France* without a third, and the witness for the defendant does not prove the contrary, and there seems no reason why it should not be so. The property in the effects of the bankrupt does not appear to be absolutely transferred to these syndics in the way that those of a bankrupt are in this country to assignees; but it should seem that the syndics act as mandatories, or agents for the creditors, the whole three or any two or one of them having the power to sue for and recover the debts in their own names. This is a peculiar right of action created by the law of that country, and we think it may, by the comity of nations, be enforced in this as much as the right of foreign assignees or foreign corporations appointed or created in a different way from that which the law of this country requires; *Dutch West India Company v. Moses* (a), *National Bank of St. Charles v. De Bernales* (b), *Solomons v. Ross* (c). We do not pronounce an opinion whether this objection is available on the plea of nil debet, or ought to have been pleaded in abatement, though we were much struck with the argument of the learned counsel for the plaintiffs on that point, for we think it is not available at all upon the evidence in this case.

The fifth head of objection is that of variance; that the award is said to be registered in the Tribunal de Commerce instead of the *Cour de premiere instance*, but the answer is, that this is clearly a surplusage.

(a) 1 Strange, 612.

(b) 1 R. &amp; Moody, 190.

(c) 1 Hen. Blackstone, 131.

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The sixth, that there is a variance, because *Beuvais* is averred to be a bankrupt, whereas he is only an insolvent in "*en etat de faillite*;" but this depends entirely upon the argument that the *English* term bankrupt necessarily means the same as the *French banque-route*, which it does not; and it is to be observed, that in the *English* copy of the appointment of syndics, the word *faillite* is translated bankruptcy. These are all the objections to the plaintiff's right to recover; we think that they are not well founded, and that the action is maintainable, without attributing to the acts of any of the *French* courts the same force as if they had been judgments between the litigating parties.

The third count is that adapted to the plaintiff's case.

Rule absolute.

See the United States Judge Story's Commentaries on the *Conflict of Laws*, pp. 436—515, 800, Boston U. S. 1834.

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Though a debt from defendant to plaintiff, larger in amount than a subsequent payment, is proved to have existed at a time previous to such payment, and no other account appears to have existed between them; the mere fact of the payment of a sum by defendant to plaintiff is not enough to take a case out of the statute of limitations without some evidence to satisfy a jury; first, that it was a payment of a debt, and next, that it was not the discharge of a balance due, but a payment intended to be applied to the part discharge of the particular debt.

A defendant is not entitled to a rule to enter a nonsuit on a point taken at the trial and afterwards approved by the court, unless the judge at *nisi prius* gives him leave so to move; but can only have a rule for a new trial.

account, at the rate of 35*l.* per annum. In a balance sheet of debts and credits which the defendant had exhibited in *November* 1826, he admitted a debt of 25*l.* to be due to the plaintiff on this account. A witness, who acted as agent for the defendant in 1829, proved by an entry in his cash-book, that he had on 24th *August* in that year paid by cheque 10*l.* to the plaintiff, on account of the defendant; he recollected that the defendant was present at the time the cheque was handed over to the plaintiff, but he did not know on what account it was paid, and had no recollection of any other circumstance of the transaction, but from this memorandum. There was no proof of any other sum of money having been paid by the defendant to the plaintiff since *November* 1826. *Ludlow* Serjt. for the defendant, contended for a nonsuit, as there was no evidence of a specific appropriation of the 10*l.* to the account in question, so as to prove a part payment of the debt in question within six years. The learned baron said that he should leave it to the jury, that if they were satisfied that the 10*l.* paid by the witness in 1829 was applicable to this particular demand, it was evidence of a fresh promise, which would support the present action, and added, that where the existence of several accounts is shown, a question might arise on what account a particular payment was made; but as here there was no evidence of any other account between the parties, they would naturally conclude that it was made on account of the board. The jury found a verdict for the plaintiff for 27*l.* 5*s.* 10*d.*, and the learned judge refused to give the defendant's counsel leave to move to enter a nonsuit.

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Ludlow Serjt. in *Easter* term, obtained a rule to set aside the verdict and enter a nonsuit (a), or to have a

(a) See p. 780.

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new trial, on the ground that the jury thought they must necessarily apply the payment on 4th August 1829 to some pre-existing debt, and therefore found that it was made in respect of the only debt that had been proved. But there was no evidence that there were not other accounts between the parties; and even if it was not necessary for the plaintiff to prove this, he should have shown that the payment was made on account or in part payment of a larger sum, expressly admitted by the defendant to have been due to him; as the bare payment of a sum of money, without any evidence to apply it to an existing debt, is not enough to take it out of the statute of limitations; *Gowan v. Foster*(a), *Martin v. Knowles*(b), *Brigstocke v. Smith*(c), *Long v. Greville*(d), *Kennett v. Milbank*(e).

Kelly showed cause. First, in the absence of other proof, the inference is, that the 10*l.* was paid on account of the board and lodging of the plaintiff's son. Secondly, as a debt of 25*l.* was admitted to exist in November 1826, and no other account appears between the parties, and 10*l.* is the only sum proved to have been since paid, the jury ought to have taken it to be only a part payment of that larger subsisting debt, and if so, the case is taken out of the statute. At the trial, the only point contested was the existence of any other account to which it could be applicable, as it was not pretended that this payment was the settlement of a balance. The onus lay on the defendant to prove the payment to have been on account of another demand. If there had been no plea of the statute of limitations, after such evidence of a larger sum having been due in November 1826, and the payment of 10*l.*

(a) 3 B. & Ad. 507.

(b) 1 N. & M. 421.

(c) *Ante*, Vol. III. 445.

(d) 3 B. & C. 10.

(e) 8 Bing. 38.

in 1829, the defendant could not have insisted on any presumption that the rest had been settled, and that the 10*l.* paid was in payment of a balance, but must have proved the rest to have been paid; nor can any such presumption of payment arise on these pleadings.

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Ludlow Serjt. and *Petersdorff* contra, were stopped.

PARKE B. (a)—The difficulty in this case is to discover the materials on which the jury found this to be such a part payment of a pre-existing larger debt, as was requisite to take the case out of the statute of limitations. I cannot see that the payment of the 10*l.* by the defendant to the plaintiff within six years, was, under the circumstances, sufficient evidence to go to a jury, that it was such a part payment. For, to take the case out of the statute, it must first be shown that the part payment was made on account of a larger debt; the principle on which it takes a case out of the statute being, that it admits a greater debt to be due at the time. That is not necessarily established by the bare evidence that 10*l.* was paid to the plaintiff by a third person, on account of the defendant. Next, it must be shown to have been a payment in part discharge of the particular debt sued for, but there was here no proof of the application of the 10*l.* to such a purpose. It was said, that as there was no evidence of any other debt due from the defendant to the plaintiff, the jury might be warranted in concluding the 10*l.* to have been paid on account of this debt; but it did not appear that it was a payment on account, and not of a balance; nor was any acknowledgment made at the time of such payment, that a greater sum was due. Then if, from what passed at the time, it could be affirmed to have been a part payment of a pre-existing

(a) Lord Lyndhurst was sitting in equity.

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larger debt, it would take the case out of the statute; but in the absence of such proof, a new trial must be granted.

ALDERSON B.—The affirmative of the issue non accrevit infra sex annos was on the plaintiff. I see no evidence that the payment of 10*l.* was made in part only of a greater debt. Payment is per se a matter quite ambiguous. As it is not an admission of any debt being due, so it does not prove that the whole sum due was then paid. The question is, who is to prove the affirmative? Now if the general issue only had been pleaded, the plaintiff must have proved the debt; nor does the plea of the statute of limitations exempt him from the necessity of giving similar proof.

GURNEY B. concurred.

Per Curiam.—The rule must be absolute for a new trial only. A party cannot have a rule to enter a nonsuit, unless leave was reserved by the judge so to move; for the plaintiff had a right to refuse to be nonsuited, and insist on going to the jury (*a*).

Rule absolute accordingly.

(*a*) *Minchin v. Clement*, 1 B. & Ald. 252. followed by *Mathews v. Smith*, 2 Y. & J. 426; *Shepherd v. Chester* (Bishop of), 6 Bing. 435; *Gates v. Ryan*, 2 Chit. R. 271; *Marsack v. Ellis*, 1 Man. & R. 511, 513; *Sexton v. Benedict*, 2 M. & P. 301. So if at the trial the plaintiff had refused to be nonsuited, and the judge had directed the jury to find a verdict against him, the plaintiff might have tendered a bill of exceptions, of which he would be deprived if the court were to order a nonsuit to be entered, without leave given at the trial, per Lord *Ellenborough*, 1 B. & Ald. 252; but see *Gould v. Robson*, 8 East, 580, *contra*. As to the power of a judge *ad nisi prius*, in an undefended cause, to nonsuit the plaintiff on a legal objection, with leave to move to enter a verdict, see *Treacher v. Hinton*, 4 B. & Cr. 431, 1 Tidd, 9th ed. 900. 904, &c.

HOOKER *against* NYE and Another.

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TRESPASS for breaking and entering the plaintiff's dwelling-house and carrying away his goods. Plea : that the plaintiff at the time when &c., held the said dwelling-house as tenant to the defendant *Nye*, under a demise at a yearly rent payable quarterly, and that rent for two quarters became due and was in arrear; wherefore *J. Nye* in his own right, and *H. Harris* as his bailiff, entered into the said dwelling-house, in which &c., to distrain &c. Replication de injuriâ suâ propriâ. General demurrer and joinder.

The replication de injuriâ suâ propriâ absque tali causâ to a plea, justifying an alleged trespass in distraining as landlord under an interest in land, viz. for rent in arrear, is bad on general demurrer.

Comyn in support of the demurrer was stopped by the court, who called on

If a plea allege that the plaintiff held as tenant to the defendant under a demise, and the plaintiff replies generally, the law presumes that the reversion is in the landlord, and that therefore he has a right to distrain. Any question as to the landlord's reversion, should be raised on a special replication.

Kinglake to support the replication. It will be said that the replication is bad; first, because it has not offered to put in issue one fact only of several which are stated in the plea; or secondly, because it is replied generally in bar to a claim of interest in land. As to the first objection, if there are several matters set out in the plea which all go to make up one subject-matter of defence, the replication is good. *Bardons v. Selby* (in error) (a). In that case all the circumstances of excuse were set out in the avowry, and they resemble those in the plea, except that the justification was there under legal process, instead of under the common law right of a landlord to distrain, and that here an interest in land is claimed, which was not the case in *Bardons v. Selby*. In the report of that case while in the King's Bench, *Patteson J.* there says (b), "The cases of *Robinson v.*

(a) *Ante*, Vol. III. 431. See S. C. 3 B. & Ad. 2.

(b) 3 B & Adol. 9, and *Crogate's case*, 8 Rep. 132.

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Rayley (a) and *O'Brian v. Saxon (b)*, are authorities to show that the replication cannot be objected to, on account of its putting in issue several facts, provided the several facts so put in issue constitute one ground of defence, which, as it seems to me, they always will where the plea is properly pleaded, however numerous they may be, since, if they constitute more than one cause the plea will be double." Here, though the plea involves several facts, yet they amount only to one point of excuse, namely, a right to distrain. Secondly, it is an objection to the replication, that it puts in issue an interest in land, because sufficient appears in the pleadings for the court to give judgment "according to the very right of the cause;" and then since the stat. 4 Ann. c. 16. s. 1. (c), the court will not regard any imperfection in the pleading, unless it is specially demurred to. [*Alderson B.* Suppose a matter of record (d) to have been involved in the defence, which would require a different mode of trial, and that the replication was as here, *de injuriâ* generally, would that be substance or form within 4 Ann. c. 16.? In *Selby v Bardons (e)*, Lord *Tenterden* who differed from the rest of the

(a) 1 Burr. 316.

(b) 2 B. & C. 908.

(c) Which enacts, that where any demurrer shall be joined, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any writ, return, plaint, or declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express together with his demurrer, as causes of the same, notwithstanding that such imperfection, omission, or defect might have heretofore been taken to be matter of substance, and not aided by the stat. 27 Eliz. entitled &c. so as sufficient matter appear in the said pleadings upon which the court may give judgment according to the very right of the cause.

(d) As in *Furdon v. Wels*, 3 Lev. 65, where to an action of trespass the defendant justified an arrest under a writ and warrant, and the replication *de injuriâ* was held bad on general demurrer. See post, 779.

(e) 3 B. & Adol. 16.

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court, does not treat it as matter of form, and the other judges only say that they feel bound by the precedents.] In all the cases in which this question has arisen since the stat. 4 Ann. c. 16. it has been on special demurrer. *Cooper v. Menke* (a), *Cocherill v. Armstrong* (b), *Bell v. Wardell* (c), *Jones v. Kitchen* (d), *O'Brian v. Saxon* (e) *Selby v. Bardons* (f). *Fursden v. Weeks* (g), which was decided on general demurrer, was before the stat. of Ann. [Lord Lyndhurst C. B. But it was after 27 Eliz. c. 5; and as it was decided on general demurrer, it shows that it is not mere matter of form, but of substance, or it would have been within that statute.] But there are words in the stat. of Ann. which are not in the stat. of Eliz., and it was passed to include "such imperfections, omissions, or defects, as might theretofore have been taken to be matter of substance, and not aided by the statute of Elizabeth. [Lord Lyndhurst C. B. But in the statute of Ann. matters of form only are enumerated.] If the demurrer to the replication may be sustained, the plea is bad in law, because it does not state any reversion in Nye, and therefore shows no right in him as landlord to distrein. It is the duty of the defendant to set out in his plea a title which the tenant is estopped from disputing; but the tenant is not bound to admit more than a right in the landlord to grant the lease which he holds under him: he is not estopped from disputing that he has any more extensive right. *Preece v. Corrie* (h).

Comyn in reply on the last point. The plea is in the usual form. Though possibly the landlord may not have the reversion, the presumption is, that he has

(a) Willes, 52.

(b) Willes, 99.

(c) Willes, 202.

(d) 1 B. & P. 80.

(e) 2 B. & C. 908.

(f) 3 B. & Ad. 2:

(g) 3 Lev. 65.

(h) 5 Bing. 24.

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the freehold. If the landlord's right has determined, that question should be raised by the replication.

Lord LYNDHURST C. B.—On the first point we have no doubt: the error is clearly in matter of substance, and the replication is therefore bad on general demurrer. As to the 4 *Ann.* c. 16. a great number of particular omissions are enumerated in the latter part of sect. 1. as being matters of form, and it is then enacted, "that the court shall give judgment according to the very right of the cause, without regarding any (*such*) imperfections, omissions, or defects, or any other matter of *the like* nature, except the same shall be expressly set down and shown for cause of demurrer." That enactment is therefore limited to the enumerated imperfections, omissions, or to matters "of the like nature," which this cannot be said to be.

As to the last point, the plea is in the usual form: it states that the plaintiff held the house as tenant to the defendant *Nye*, under a certain demise. In *Preece v. Corrie* (a), the point relied on to invalidate the landlord's reversion was raised by a special plea in bar to the cognizance. There is here a *prima facie* right in the landlord to distrain, and the onus is on the other party to show that such a right does not exist. If that can be done, it must be by a special replication.

Judgment for the defendant.

(a) 5 Bing. 24.

SIMPKIN *against* ASHURST, Gent. one, &c.

1834.

ASSUMPSIT to recover 40*l.*, the difference between the value of fixtures and the sum paid by the defendant on taking possession of them, under an agreement dated 29th *July* 1829, by which he agreed to take, and the plaintiff to let, certain premises then in the occupation of the plaintiff, "for the term of two years wanting three days from the 8th of *August* then next," subject to certain covenants; among others, to purchase all the fixtures in the said house as by a list thereafter written, at the sum of one hundred guineas, to be paid upon having possession, which was to be on or before the said 8th day of *August* then next, and the said fixtures and articles were to be valued in the usual way before having possession. *And if the said defendant should agree with the superior landlord of the said premises for a longer term than that by the said agreement granted, he was to pay such further sum at which the said articles were valued; and if he should not agree with the landlord for a further term at the end of the said term thereby granted, then the said plaintiff was to have the liberty of taking the said fixtures at the sum of sixty pounds, if he should elect so to do, and pay the said sum to the said defendant on or before the 5th day of August 1832.*"

The first count of the declaration stated the above agreement with mutual promises, and then after the necessary introductory statements, averred as follows: "that after &c. on 17th *August* in the year 1832, at &c. the defendant agreed with the superior landlord of the premises, to wit, one *George King*, for a longer term, to wit, for a term of three quarters of a year beyond the said term granted by the said memorandum of agreement; and by virtue thereof remained in possession of the said premises after &c. to wit, for three

An under-tenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is *quasi* a tenant at sufferance; and the mere fact of occupation, coupled with the payment of rent for such time of occupation, does not raise the presumption of a demise for years, unless there is some evidence to show an agreement for a demise for a term.

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quarters of a year after &c., and by reason of the premises &c. he became liable to pay the sum of 40*l*. being the excess of the sum at which the said fixtures were so valued above the 105*l*. so paid &c. by the said defendant." Breach, that he would not pay &c. There was another breach for non-repair, which became immaterial. The second count on a consideration executed, was similar in substance to the first. At the sittings at *Guildhall* after *Hilary* term before *Garnsey* B. it appeared, that in 1818 Mr. *Ring* owner of the premises in question, which consisted of a house and grounds at the foot of *Highgate Hill* near *Holloway*, granted a lease of them to a Mr. *Hughes* for fourteen years, from the 11th *August* in that year. In *July* 1823 the plaintiff took an assignment of the lease from *Hughes*, and in *August* 1830 let the defendant into possession under the above agreement. The fixtures were valued at 147*l*., of which the defendant paid 105*l*. under the agreement upon taking possession. The plaintiff's term in the premises expired on the 8th *August* 1832, and the house never reverted to him. Although the demise to the defendant, under the agreement, fell short of that period by three days, he continued in possession till *Lady-day* 1833. *Ring*, the landlord, proved that the rent was originally 100*l*. per annum, but for the interval after the 11th *August* 1832 to *Lady-day* 1833 the defendant remained in possession, and paid him 81*l*. 5*s*. being at the increased rate of 130*l*. per annum. *Ring* also proved that the defendant called on him on 1st *June* 1832, and asked him about continuing the lease at the same rent, but no terms were concluded, and *Ring* referred the defendant to his solicitor. The receipt produced at the trial was as follows:—"Received, 28th *March* 1833, of *W. H. Ashurst*, esq. the sum of 81*l*. 5*s*. for the occupation of a house at *Holloway*, from 11th *August* last to 25th

inst. (Signed) *G. Ring*." The word "rent" appeared to have been originally written instead of "occupation," but had been struck out, and the latter inserted in its stead. The learned judge, in his direction to the jury, said, that to support the action the plaintiff should make out that the defendant had agreed with his superior landlord for a further term; but no inquiry had been made by him about the existence of any agreement, and the receipt did not prove such an agreement, it being for occupation, not for rent; and, therefore, negatived the existence of any agreement for a term, as the landlord could not distrain for occupation, though he might for rent reserved under a demise^(a). The jury found a verdict for the defendant, on the breach set out above. In *Easter* term *Kelly* moved to set aside the verdict for the defendant for misdirection, as the judge should have told the jury that the money paid was in the nature of an increased rent, and was evidence of an agreement for a term. *Thesiger* and *Hoggins* were to show cause, but the court called upon

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Kelly and *Butt* to support the rule. The question is, did the parties intend to agree for that which would be in legal signification a new term, or for any occupation of the premises which would entitle the tenant to the benefit of the agreement and fixtures. [*Parke* B. There must be a *term*, and if so, that must in law be taken to be a tenancy for a term of years, though the demise be only "for a quarter of a year &c." (b)]. The meaning of the parties, not the strict words of the instrument, must be looked to; now they never had in view the technical distinction suggested to the jury by which, in the case of a regular tenancy, a landlord would be able to distrain, but in the other cases an

(a) *Hegen v. Johnson*, 2 Taunt. 148; *Dunk v. Hunter*, 5 B. & A. 322.

(b) See *Co. Litt.* s. 67; *Bottin v. Martin*, 1 Camp. 317.

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action for use and occupation only would lie. Their intention, as can be collected from the terms of the agreement, was, that if, at the end of the defendant's term, the house should revert to the plaintiff, the fixtures were to be bought by the plaintiff at a diminished sum of 60%.; but that if the defendant kept possession to the end of the plaintiff's term, they were to be taken at the valuation by the defendant: the reason being that they would be of more value to him then, as against the superior landlord. Here the defendant, by continuing in possession during the three days reversion reserved by the plaintiff, has adopted the alternative which was open to him, of continuing the tenancy; and as he prevented the plaintiff from regaining possession of the fixtures, without being liable to be treated as a trespasser, he must pay the full value for them. But even if a contract for a demise should be proved, the evidence of the landlord shows that there was some new agreement for a holding, and the rent was increased, and it lay in the defendant to show that it did not amount to a demise for a term. At all events the continuing in possession and paying rent is clearly evidence of a tenancy (a); à fortiori, when coupled with *Ring's* reference to his solicitor and a receipt of rent, there was evidence of an agreement for a term.

PARKE B.—The jury received the only proper direction. To entitle the plaintiff to recover a larger compensation for the fixtures, he must show that before the end of the first term in the premises an agreement was made by the defendant for a new and a longer term; for the agreement must be for a term, however short. Here the defendant remained in pos-

(a) *Roe v. Ward*, 1 H. Bla. 97; *Doe v. Watts*, 7 T. R. 83; *Bishop v. Howard*, 3 B. & Cr. 100.

session afterwards as a tenant by sufferance (a), and might be treated by the landlord either as a tenant at will or a trespasser. He chose to treat him as a tenant at will. If the landlord does not choose to take the fixtures, the tenant gets them, and must remove them in the three days. The case is perfectly clear and free from doubt. The jury must have negatived the existence of any such agreement.

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BOLLAND and ALDERSON Bs. concurred.

GURNEY B.—The question at the trial was, whether the plaintiff had made out an agreement between the defendant and the landlord for a longer term? They met, but no agreement was made; and though the defendant afterwards remained on the premises, holding over for a time, for which use and occupation, and not as rent, an increased sum of money was paid, but under no previous agreement. If there had been an agreement, though only for six months, the case might have been different.

Rule discharged.

(a) For so long as the occupation is merely continued with the bare acquiescence, or without the disagreement of the person entitled to the possession and tenancy at sufferance exists, *Sykes d. Murgatroy v. ———*, cited 1 T. R. 161; Co. Lit. 270. b.; Cro. Jac. 169.

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STOKES *against* WHITE.

In an action on the case against a party for causing the arrest of a person privileged from arrest, (*e. g.* a witness attending on his subpoena or a practising attorney) thereby putting him to the expense of finding bail and procuring his discharge by order of a judge, the plaintiff must show that his imprisonment at the particular time in question took place by some act of the defendant, and that he knew or recognized the circumstances accompanying it, and also knew that the party arrested was privileged at that time.

Whether such an action is maintainable, *quære*.

The offices of the sworn and side clerks of the Exchequer are not abolished by stats. 1 W. 4. c. 70. or 2 & 3 W. 4. c. 110., but as the sworn clerks are thereby disqualified from acting as practitioners, the side clerks can no longer sue in their names, though they may still practise there as attornies without being admitted as such.

CASE. The defendant was sued as one of the side clerks of *Stephen Richards, esq.*, one of the sworn attornies of the office of pleas of his majesty's court of Exchequer at *Westminster*. Declaration stated, that whereas before the committing of the grievances hereinafter next mentioned, to wit, on 16 June 1832, there issued out of the Exchequer of Pleas a certain writ of our said lord the king, called a subpoena ad testificandum, directed to the plaintiff and *John Doe*, commanding them to appear in their proper persons before his said majesty's justices assigned to take the assizes at *Bristol*, in and for the city of *Bristol*, on *Saturday* the 18th day of *August* then next coming, by nine of the clock in the forenoon of the same day, and so from day to day till the cause was tried, to testify the truth according to their knowledge, in a certain action then pending in the said court of his said majesty's Exchequer, between *J. Smith*, surviving assignee, plaintiff, and *J. Buckle, W. C.*, and *J. P.* defendants, of a plea of trespass on the case upon promises, on the part of the plaintiff, and at the aforesaid day, by a jury of the country, between the parties aforesaid, of the plea aforesaid, to be tried; and that they the said *Thomas Stokes* and *John Doe* should in no wise omit, under the penalty of 100*l.* And whereas afterwards and before the committing the grievances &c., to wit, on 16th *August* 1832, the said plaintiff then residing in the island of *Guernsey*, being the place of his abode, was duly served

with a copy of the said writ of subpoena ad testificandum, and in obedience thereto he the said plaintiff left his said place of abode, and attended in his proper person before his majesty's justices assigned to take the assizes at *Bristol*, in and for the city of *Bristol*, on *Saturday 18th August*, in the year aforesaid, and so from day to day, until the cause was tried, to testify the truth according to his knowledge in the said action so depending as aforesaid; and which said action afterwards, to wit, on *22d August 1832*, was tried by a jury of the country between the parties aforesaid, of the plea aforesaid, to wit, at &c. Yet the said defendant well knowing the premises aforesaid, but contriving &c. to deprive the plaintiff of the benefit of his privilege as a witness attending the trial of the said action, and to put him to great trouble, charges, and expenses of his monies, afterwards, and before a reasonable time had elapsed for the return of the said plaintiff from *Bristol* aforesaid, to his said place of abode in the island of *Guernsey* aforesaid, to wit, on *23d August 1832*, at &c. aforesaid, wrongfully and unjustly caused and procured the said plaintiff to be, and the said plaintiff was then and there arrested by his body upon and by virtue of a certain writ of our said lord the king, called an *alias capias* of privilege, before then issued out of the said court of Exchequer at *Westminster* aforesaid, directed to the sheriffs of *Bristol*, by which said writ our said lord the king commanded the said sheriffs (as before he had commanded them) that they should omit not by reason of any liberty of their city, but should enter the same and take the said plaintiff and *John Doe*, wheresoever they should be found in the said sheriff's bailiwick, and them safely keep, so that they might have their bodies before the barons of his said majesty's Exchequer at *Westminster*, on the *2d November* then next coming, to answer the said *Thomas*

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White, one of the said clerks of *Stephen Richards*, esq. one of the several attornies of the office of pleas in his said majesty's said court of Exchequer, of a plea of trespass, and that the said sheriffs should have there that writ, and which said last-mentioned writ was then and there marked and indorsed for bail for 74*l.*, and the said defendant then and there wrongfully and unjustly caused and procured the said plaintiff to be imprisoned and kept detained in prison upon the said arrest for three days then next following, and until the said plaintiff in order to procure his release and discharge from the said imprisonment, was forced and obliged to and did procure certain persons, to wit, *J. P. H.* and *W. H. B.* to become bail for the appearance of him the said plaintiff in the court of Exchequer at *Westminster* aforesaid, to answer the said defendant according to the exigency of the said writ, and upon that occasion the said plaintiff and the said *J. P. H.* and *W. H. B.* were forced and obliged to and did enter into a certain bond or obligation in a large sum of money, to wit, the sum of 148*l.* 6*s.* for the purpose aforesaid, by means of which said several premises the said plaintiff not only suffered great pain of body and mind, and was greatly exposed and injured in his credit and circumstances, but was also thereby put to great trouble, charges, and expenses of his monies, in and about the procuring of the said bail and entering into the said bail-bond, and obtaining his release and discharge from the said imprisonment, and in and about the applying for and obtaining a certain order of the Hon. Sir *J. L.* knt. one of the justices of the court of King's Bench, for the discharge of the said plaintiff out of the custody of the said sheriffs of *Bristol* (a), and for the delivering up of the bail-bond to be cancelled, and the said plaintiff hath been and is by the

(a) See *Pritchitt v. Boevey*, ante, Vol. III. 949.

premises and otherwise greatly injured and damnified, to wit, at &c. The second count substantially resembled the first, but did not state the defendant to be a side clerk, or state the subpoena at length. Third count. And whereas also the said plaintiff, before and at the time of committing the grievance hereinafter next mentioned, was from thence and hitherto hath been and still is one of the attornies of the court of our said lord the king, before the king himself at *Westminster*, and the said plaintiff during all that time hath prosecuted and defended, and still doth prosecute and defend divers suits and pleas in the same court, for divers liege subjects of our said lord the king as their attorney, and the said plaintiff, and all the attornies of the said last-mentioned court, prosecuting and defending suits and pleas therein for their clients, before and at the time of committing the said last-mentioned grievance, ought from an ancient and laudable custom, from time immemorial used and approved of according to the laws and customs of this realm, and the liberties and privileges of the said last-mentioned court, to have been and still of right ought to be free and exempt from being arrested and holden to special bail in any personal action at the suit of any other person or persons, to wit, at &c. Nevertheless the said plaintiff well knowing the premises, but contriving &c. to deprive plaintiff of the benefit of his said last-mentioned privilege, and to put him to great trouble, charge, and expense of his monies, afterwards, to wit, on 23d August 1832, at &c., wrongfully and unjustly caused and procured the said plaintiff to be and the said plaintiff was then and there arrested &c. (as in first count.) The last count merely stated the plaintiff to be an attorney, and that the plaintiff well knowing the premises, and contriving to injure the plaintiff, arrested him, as in first count. Plea: general issue, not guilty. At the

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trial before Lord *Lyndhurst* at the *Middlesex* sittings after last *Trinity* term the plaintiff was proved to be a duly admitted and certificated attorney of the King's Bench, and the defendant to be a side clerk of Mr. *Richards*, one of the four sworn clerks or attorneys of the office of the clerk of the pleas of the court of Exchequer. The attorney general, Sir *John Campbell*, for the plaintiff, having admitted a debt of 74*l.* 3*s.* due from him to the plaintiff, for business done as his *London* agent, it was proved that a side clerk or other officer of a sworn attorney of the office of the clerk of the pleas of the Exchequer, had always exercised the privilege of arresting and holding to bail attorneys of the other courts, on a writ of *capias* of privilege issuing out of the Exchequer of Pleas (a). A writ of *capias* of privilege was shown to have been issued from the Exchequer office on 18th *April* 1832, (the first day of *Easter* term) at the suit of *White*, (recited thereon to be a side clerk of the court) against *Stokes*, indorsed for bail for 74*l.* 3*s.*, and directed to the sheriffs of *Bristol*, but was not executed, the plaintiff having gone to reside in *Guernsey* in that month. On *Saturday* 18th *August*, the commission day of the *Bristol* assizes, the plaintiff arrived at *Bristol*, from *Guernsey*, by a steam packet, in pursuance of a subpoena with which he had been served, to attend as a witness in *Smith v. Buckle* and others, about to be tried at those assizes. On *Wednesday* 22d *August* an alias *capias* of privilege, tested 16th *June*, was issued by *White* in person, directed to the sheriffs of *Bristol*, and was lodged with them the next day, *Thursday* the 23d. The copy given in evidence contained no caution against arresting privileged persons. The trial took place on the 23d, and the plaintiff was examined; he being feeble returned to his lodgings directly after the trial ended,

(a) See *Walker v. Rushbury*, 9 Price, 16; 1 Y. & J. 199. S. C.

and was arrested there about noon on the *Thursday*, while still in his wrapping gown and slippers, having never left the house. The plaintiff on being arrested showed the officer the copy of subpoena with which he had been served, and claimed his privilege. After remaining in custody twenty-six hours, he gave bail and was liberated. It was shown that at that time coaches ran daily from *Bristol* for *Weymouth*, and that a steam packet left *Weymouth* for *Guernsey* on the evenings of *Tuesday* and *Friday* in each week. No evidence was given that the plaintiff had made any preparation, or taken any step for leaving *Bristol* on his return to *Guernsey*. The summons and order of a judge for discharging the plaintiff on common bail, and delivering up the bail-bond to be cancelled, on the ground that he was protected by his subpoena, were put in and proved. It was also shown that the plaintiff's managing clerk had opposed that order being made. The plaintiff had a verdict for 10*l.* damages, the defendant having leave to move to enter a nonsuit, or in arrest of judgment on certain points then raised, and which are afterwards stated.

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In last *Michaelmas* term, *Talfourd* Serjt. moved accordingly on behalf of the defendant. The first and second counts rest the plaintiff's ground of action on the violation of his privilege from arrest as a witness; the third and last on the same privilege as an attorney. The latter counts neither allege that no debt was due from the plaintiff to the defendant, nor that the arrest was malicious or without probable cause; but all of them allege that the defendant well knowing the premises (*viz.* the plaintiff's privilege and the circumstances under which he was then at *Bristol*;) but contriving &c. to deprive him of the benefit of his privilege (as witness or attorney) procured him to be

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arrested. As to the first and second counts, without entering into the question on them, which may consist partly of law and fact, viz. whether the privilege of a witness was continuing at the time of the arrest, it is contended, first, that no action lies for a breach of such alleged privilege; secondly, that if it does it must be brought in trespass and not in case; thirdly, in neither case will the plaintiff be liable without proof of the *scienter*. This is an action, in form at least, of the first impression. It is not a personal privilege of the individual, the breach of which by arrest is to be regarded as a personal damage to him, for which he has a remedy by action, but is the privilege of the court which he attends as a suitor or witness, recognized for the sake of the public, and to be obtained by application for a discharge to that court. Had the privilege been personal, instances of actions by persons so privileged would have been found. In *Cameron v. Lightfoot* (a), the plaintiff had been arrested while dining at a tavern, on his return from attending the court of C. P. as a party in a suit, and was discharged by the court as privileged. Having afterwards brought an action of trespass and false imprisonment, he was nonsuited. After argument of a rule to set aside the nonsuit, *De Grey C. J.* in delivering the opinion of the whole court, said, the question was, whether the privilege of the king's court extended to suitors redeundo did so vitiate the arrest, or suspend the operation of the writ, that the taking a man thereon became an act of trespass on the party taken? and the court held not, as in none of the books was there any intimation of an action being maintainable for such an arrest; the question having always been merely the delivery of the party, the process still continuing legal and capable of execution at a subsequent time, when privilege did not intervene. The court there cited *Vande-*

(a) 2 W. Bla. 1190.

*velde v. Lluelin* (a), as follows, "If a witness coming to testify in a cause in *Middlesex*, be arrested in *London* by one knowing the cause, he hath no remedy but by habeas corpus to examine and deliver him thereby, but if there be any contempt by the officer &c., an attachment may be afterwards awarded against him, for they are as well to have privilege as the parties."

Second point. Though the decision in *Cameron v. Lightfoot* does not turn on the form of action, which was trespass and false imprisonment, yet it is there held by the court that that is the proper remedy for a party arrested without lawful authority. Unless the arrest is illegal, there is no personal injury or special damage; and if it is, the imprisonment is a direct and immediate injury, not the subject of an action on the case.

Third point. Even if an action be maintainable, and in this form, the plaintiff cannot recover without proving the *scienter* of the defendant; or a plaintiff who is entitled to issue a writ will be answerable for the officer's violation of privilege in an ill-timed execution of it, or other excess of an authority. The writ had here been first sued out as long before as the 18th *April*, the alias *capias* was tested in *June*, and though the defendant might have had information of the plaintiff's being at *Bristol* on the 18th of *August*, before he issued the latter, there is no evidence that he knew of or ordered the arrest to be made when it in fact was.

As to the third and last counts, the same arguments apply; besides which, the defendant, as a side clerk of a sworn attorney of the Exchequer, was entitled, on suing out a *capias* of privilege, to arrest the plaintiff, though an attorney of another court, *Walker v. Rushbury* (b), *Bowyer v. Hoskins* (c), cited in *Elkins v. Harding* (d). Could the defendant be presumed to

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(a) 1 Keble, 220, *Hil.* 13 C. 2.(b) 9 *Fri.* 16.(c) 1 *Y. & J.* 199(d) *Ante*, Vol. I. 274.

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know that an attorney retired to *Guernsey* could claim the privilege of the court as a practising attorney? Nor has 2 & 3 W. 4. c. 110. taken away the office of sworn or side clerk, though the duties of those officers are there varied and apportioned. They are recognised by 11 G. 4. and 1 W. 4. c. 70. s. 10, and are there distinguished from the other attorneys made admissible to practise in this court by that act. Nor can the defendant, after quâ side clerk arresting the plaintiff, now say that his own power to do so by capias of privilege was gone at the time. Besides, the writ on which the arrest took place was merely an alias, continuing (a) a writ originally sued out by the defendant as side clerk, before the act 2 & 3 W. 4. c. 110. [*Bayley B.* You say privilege as a side clerk takes away privilege as an attorney. It does not appear that evidence was given that defendant knew that the plaintiff was a certificated attorney. That knowledge is alleged in the third and fourth counts, but was not proved. It will only appear from the process that the plaintiff was privileged as an attorney or otherwise at the time of the arrest.]

The court granted the rule in the alternative as prayed.

Cause was shown in *Michaelmas* term 1833, by the *Solicitor General* (Sir John Campbell). First, can a man who, being by law privileged from arrest, is nevertheless imprisoned, be without any remedy for damage sustained thereby? Neither against the sheriff, who without connivance of his privilege obeys the writ (b), nor against the plaintiff who has issued regular process, which is affirmed though the defendant is discharged from it, can he have any remedy in trespass.

(a) See *ante*, p. 308.

(b) See *Parsons v. Loyd*, 3 Wils. 345; 6 Rep. 54. s., Doug. 671; Sir O. Bridge, 356; 3 East, 127; 4 Taunt. 668.

Then if technical objections exist to an action of trespass, the plaintiff having sustained temporal damage from the arrest by being driven to procure bail, &c., may sustain case, *Com. Dig. tit. Action upon the Case (A)*. When *Cameron v. Lightfoot* was cited in *Tarlton v. Fisher* (a) as a decision that trespass would not lie for an arrest made notwithstanding privilege, Lord Mansfield distinctly intimated that in his opinion case would. *Vandevelde v. Lluellyn* only shows that as between the officer and the party arrested, the officer is to be protected by the writ, and is only punishable by the court for contempt, if he knew that the party was attending under a subpœna; nor is a habeas corpus the only remedy, as stated in *Keble*, for he might sue out a writ of privilege or apply to a judge for his discharge. The personal privilege of the plaintiff as a witness, differs much from that of a party arrested within a privileged place, in which case only the lord of the franchise can sue for its infraction.

As to proof of the *scienter*, the jury have found that the plaintiff was under the protection of a subpœna. The defendant's opposition to the plaintiff's discharge on the judge's summons, ratified the previous act of the officer in arresting him, and was strong evidence for the jury, that the alias was issued against the plaintiff, knowing that he was subpœnaed in a cause at the *Bristol* assizes. [*Bayley B.* The defendant might attend before the judge for the purpose of ascertaining there whether the plaintiff remained in *Bristol*, or had been *bonâ fide* waiting there to return by the *Guernsey* steam packet.] Next, the defendant ceased to be a side clerk on 15th August 1832, when the statute 2 & 3 W. 4. c. 110. passed: so that the general privilege of the plaintiff as an attorney to be free from arrest on mesne process, was no longer countervailed by that special

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(a) 2 Dougl. 671.

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privilege of the defendant as side clerk, which was acquired in respect of duties which had ceased, and were transferred to other officers. The defendant was then placed on the footing of other attorneys. Now it was settled in *Pearson v. Henton* (a), that though an attorney of K. B. may sue an attorney of C. P. by attachment of privilege, he may not arrest and hold him to bail, and if he does the proceedings will be set aside as irregular, with costs. *Walker v. Rushbury* (b) and *Bowyer v. Hoskins* (c), were decided on motion only, and before the passing of 11 G. 4. & 1 W. 4. c. 70, for the uniformity of process. [Lord *Lyndhurst*. *Bowyer v. Hoskins* was decided expressly on the practice of this court as to the privilege of its clerks in court.] By the first cited act no person (*viz.* no sworn clerk) holding any of the offices mentioned in the act shall act as an attorney: then how can the side clerks, who as such could only sue in their names, any longer practise?

*Kelly* on the same side, was heard in this term.

LORD LYNTHURST C. B. — Even assuming from the date of the alias that the defendant hoped to find the plaintiff at *Bristol* about that time, all that he did on that occasion was to lodge the writ with the sheriffs, leaving it to them to do their duty respecting it in a proper manner. He might well have concluded that they would only execute it on the plaintiff, if he delayed his return to *Guernsey* improperly. As to the attendances of the defendant's clerk before the judge on the summons for discharging the plaintiff on common bail, they amounted to no more than attending him on the defendant's part to ascertain whether facts were stated in the plaintiff's affidavit, which

(a) 4 D. & R. 73.

(b) 9 Pri. 15.

(c) See now 11 G. 4. & 1 W. 4. c. 70. s. 10.

in the judgment of the court were sufficient to establish the privilege claimed. The most strenuous opposition to the discharge would amount to no more, and certainly not to any recognition or affirmance by the defendant of the previous act of the sheriff's officer at *Bristol*. Nor did the plaintiff, at the time of the application to the judge, remain in actual personal custody, having given bail to the sheriff on the 28th. The defendant did no act in the interim to keep the plaintiff in custody. Then if no act of the defendant in the arrest in question, or knowledge of the circumstances under which it took place, is shown, he was not liable to an action. Lord *Mansfield* says, in *Tarleton v. Fisher* (a), whether, if the defendants had done any thing oppressive, with full notice of all the circumstances, an action on the case might be maintained, would be another question.

Another point was made for the plaintiff, that his general privilege from arrest was not at the time of the arrest in question any longer countervailed by the special privilege of the defendant as a clerk in court, or side clerk of one of the sworn attornies, or clerks of this court; and the statute 2 & 3 W. 4. c. 110, passed 15th Aug. 1832, was cited in support of this argument. It is intituled, "an act for the better regulation of the duties to be performed by the officers on the plea or common law side of the court of Exchequer," and after reciting the statute 11 G. 4. and 1 W. 4. c. 70. for the more effectual administration of justice, and naming two persons as being clerk and deputy clerk of the pleas, and four others as being "the four sworn clerks in the said court," proceeds to state that the deputy clerk of the pleas and "the said four sworn clerks" have conducted and performed the business of the offices on the plea

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or common law side since the passing the act of 11 G. 4. and 1 W. 4. c. 70., but without any regulation as to the respective duties to be performed by each. It then goes on to apportion those duties among the before-named individuals. But the effect of this act is not to abolish the offices of sworn or side clerk, or to take from any of them, whether named in the act or not, any privilege which they had before it passed. They are touched by it in no other manner except that in consequence of it they, as side clerks of this court, have no duties to perform, though their offices as such continue to exist. By the acknowledged course of the court (a) side clerks or clerks in court (viz. clerks of the four sworn clerks), and practising in their names, might arrest attornies of other courts by *capias* of privilege. The side clerks, in the causes which they conducted themselves, performed their duties in the name of the sworn clerks; whereas now the duties of the latter are performed by the same individuals in their character of officers of the court, designated and appointed by the act 2 & 3 W. 4. c. 110, Section 30. enacting that no person holding any of the said offices, or being an assistant or clerk to any of them, shall act as an attorney, is directed against the new offices. Now a side clerk practised in the name of one of the four sworn clerks or attornies. The defendant's first writ of *capias* was sued out accordingly before the passing of 2 & 3 W. 4. c. 110, so that the alias issued afterwards was only following up his previous proceeding (b). It was the side clerk's privilege, as well as that of the sworn clerk, so to sue, though the mode of instituting the suit was in the name of the

(a) See Baron Hulleck's judgment in *Bossey v. Hastings*, 1 Y. & J. 203.

(b) N. B. Both writs of *capias* were issued before the 2 Will. 4. c. 39. s. 1. the uniformity of process act, came into operation.

sworn clerk. The sworn clerks, as such, still exist as officers of the Exchequer of Pleas, and consequently the side clerks also, with their privileges. The side clerks are therefore entitled to practise without being admitted attorneys of the court; whereas by 11 G. 4. and 1 W. 4. c. 70. s. 10. attornies of other courts must be admitted here before practising in it. The sole object of the framers of the act 2 & 3 W. 4. c. 110. was not that the offices of sworn clerks should be abolished, but merely that the several duties to be performed by them in their new characters of master and prothonotary, clerk of the rules and filacer, should be precisely regulated and apportioned among them. Their several privileges as sworn clerks are preserved as well as their former official duties as such, but the latter are allotted among them by the act.

**PARKER B.**—In order to make the defendant responsible in this action, the plaintiff was bound to establish that his imprisonment took place by the act of the defendant, and that the defendant knew the plaintiff to be a practising attorney, and as such, privileged at the time; for his privilege only exists with reference to his constantly attending in the courts. Even assuming that an action on the case would lie, it could not, at all events, be supported, unless by showing that the defendant had knowledge of the circumstances of the arrest at the time it took place, and ordered it to take place. Subsequent recognition or affirmance of it, would not suffice. Now the declaration avers, that the defendant well knowing the premises caused the plaintiff to be arrested and imprisoned. Neither the *scienter* or the other averment have been proved. There is no period of time when any act is done by the defendant ordering the plaintiff to be imprisoned,

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with knowledge of the circumstances of the arrest. For it is too much to say, that one man, by opposing the application of another to be discharged from an arrest, thereby orders him to remain in custody, even if successful in that opposition. As to the stat. 2 & 3 W. 4. c. 110. I am of opinion that side clerks remain as they did before, and may continue to act as attornies in this court, but cannot practise in the name of sworn clerks, who are disqualified by section 3 from acting as practitioners. For though sect. 10 does not mention *side clerks* in particular, it never could have intended to exclude them from practising altogether, which would be the effect of the argument for the plaintiff.

BOLLAND B. concurred.

ALDERSON B.—The plaintiff sent down the writ to the sheriffs; they arrested the plaintiff under ambiguous circumstances, and a motion for the defendant's discharge on common bail was afterwards made with success. Then is the plaintiff, for their mistake, to be liable to an action on the case for having knowingly occasioned an injury to the plaintiff by malice and oppression?

Rule absolute to enter a nonsuit.

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DANIEL HERRING an infant, by W. H. KIMBER his next friend, *against* BOYLE.

**TRESPASS** for assault and false imprisonment for 20 days, by means whereof the plaintiff not only was prevented from seeing his family or friends, and from having any intercourse or communication with them, but was also thereby found and obliged, and did necessarily pay, lay out, and expend a large sum of money, to wit &c., in and about the obtaining, and causing and procuring a writ of habeas corpus to be issued out of his majesty's court of King's Bench at *Westminster*, in order to procure his liberation and discharge from such imprisonment as aforesaid, and other wrongs &c. Plea: general issue. The plaintiff, a boy about 11 years old, was sent to the defendant's academy at *Stockwell*, by his mother, a widow. The terms of the school were 20 guineas a year, payable quarterly in advance. The boy went at *Michaelmas*, but the quarter was not paid in advance, and on 24th *December* his mother called about nine in the evening, asking to take him home for a few days. The defendant said he was in bed, and would not permit her to see him, saying, he would not let him go home till the quarter was paid. On 31st *December* she paid the quarter due in advance at *Michaelmas*. On 2d *January* she again called at night, and asked to take away her son; but the defendant told her he was in bed, would not let her see him, and declined to let him go till the price of his board and tuition for the fresh quarter which had been entered on should have been paid. The boy having been again formally demanded, the defendant refused to let him go, unless compelled by law. On the 11th *January* defendant

Where the master of a school refuses to deliver up the person of a boy to his parent, on account of a quarter's schooling not having been paid according to contract, but there is no evidence that the boy was present at the refusal, or knew that his mother had wished to take him home and been refused, or was in any way restrained though kept at school during the *Christmas* fortnight; an action for false imprisonment cannot be maintained by him.

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was served with the copy of a writ of habeas corpus, and delivered up the boy. The plaintiff did not see his mother on either of the occasions when she called to take him home, nor was he aware that she had called for him.

At the trial before *Gurney B.* at the *Middlesex* sittings, the plaintiff was nonsuited for want of evidence of imprisonment.

*Comyn*, in *Easter* term, obtained a rule nisi for setting aside the nonsuit and having a new trial; against which

*Hutchinson* now showed for cause, that there was no proof of any violence or forcible detention by the defendant, of the boy's person against his will, or even that he knew of her visit. *Vi et armis et contra pacem* were not proved. The court then called on

*Comyn* and *Butt* to support the rule. There was evidence to go to the jury, from which they might have presumed a detention and imprisonment of the boy against his consent. It was not necessary to prove an actual assault or violence used to him, for in contemplation of law, every detention against a person's will includes an assault. Thus, locking the door of a room where a supposed lunatic is, would give him, and him only, the right of suing for false imprisonment. So where a gaoler does not liberate a convict after his term of imprisonment is ended; and yet the latter may be ignorant when it expired. It must be conceded, that the plaintiff originally assented to be placed at the defendant's school by his mother, because the law would presume his assent to what was apparently for his benefit; but as there is no evidence of the boy's

consent, the presumption of his consent in fact ended when his mother, a widow, who had the right not only to control and direct him, but to the possession of his person at his early age, determined that contract for his board and education, under which only he remained at the school. For any unnecessary expense sustained by her from the plaintiff's misconduct, it seems that she might have sued in case (a). After this, the boy being formally demanded on her behalf, the defendant declares he will not give him up till compelled by law, and only relinquishes his custody of him after the issuing a habeas corpus. Then in the absence of direct evidence of the boy's assent or dissent to being detained, the declarations of the defendant were evidence for a jury to find, that he detained the boy not for the original and lawful purpose of educating him, but till a sum of money could by that means be wrung from his relative. It was not necessary to prove that the boy expressed a wish to go, and had he wished to stay, the defendant might have proved the fact; nor has he pleaded a licence. It should have been left to the jury, whether detention during the usual period of holidays, was not against the boy's will. [*Alderson B.* Your argument assumes, that as a detention is presumed to be against the will of the party, every boy at school is kept in imprisonment there, though by the authority of his parents. If that is not a fallacy, the deduction you would contend for follows; viz., that when that authority is at an end, his remaining at school might be an imprisonment. But was it not incumbent on you to show that the plaintiff remained at school against his will; and is there any evidence of that fact? A habeas corpus may be granted, to obtain the custody of an infant, who can exercise no will of

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(a) See *Hall v. Hollander*, 4 B. & Cr. 660.

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its own. *Bolland B.* The defendant is not proved to have any communication or contact with the plaintiff, at the time the mother called. *Alderson B.* The presumption that every grown man under restraint is presumed to be so against his will, may exist in the case of a lunatic; but is rebutted in the case of a school-boy, on account of the necessary object of his education. In trespass for criminal conversation, the constructive assault on the wife being supposed to be against her will, is unlawful; whereas here it is lawful. You admit that had the boy's consent to stay at school appeared, no action could have been maintained; that shows the will of the mother not to be, quoad hoc, the will of the child. The plaintiff was bound to show distinctly the dissent of the child.]

*BOLLAND B. (a)* As this case was moved before my Lord *Lyndhurst* and my brother *Parke*, we will mention it to them, though we entertain no doubt on it.

*Cur. adv. vult.*

On a subsequent day *BOLLAND B.* said, The question in this case was, whether or not this action was sustainable under the circumstances proved? And as it did not appear from the judge's notes, that any evidence of a false imprisonment had been given, which could go to the jury, I am of opinion that the rule for setting aside the nonsuit must be discharged. It was put to the court in argument, that the misconduct of the master in refusing to give the boy up to his mother when demanded, amounted to a constructive imprisonment of the boy; but there was no evidence that he was aware of any restraint or refusal to let him go, or even knew

(a) Lord *Lyndhurst* was sitting in equity, and *Parke B.* at nisi prius.

what was going on respecting him. Many authorities establish, that a constructive imprisonment may take place without actually touching the party, as if a bailiff enter a room, and tell a person he arrests him, and locks the door (a); but I find none which extend that doctrine to a case where the party is not shown to be corporeally present at the time of the defendant's act. No evidence is given of any refusal or unwillingness on the part of the boy to stay where he was; he may have been all along willing to stay; nor that the master ever stated in the boy's presence, his refusal to let him go. Then the boy cannot be said to have been imprisoned against his will.

ALDERSON B.—In the total absence of all evidence that the boy knew of the master's refusal to let him go, the rule must be discharged. He was not shown to be cognizant of any restraint, and the defendant's refusal in his absence to deliver him to his mother, does not, in my opinion, amount to a false imprisonment.

GURNEY B.—There was no evidence that he even knew of his mother's visit, or that she had requested that he might return home, which the master had refused, much less that he was restrained, or conscious that he was so in any degree.

Lord LYNDHURST C. B. added,—I am entirely of the same opinion, as is my brother *Parke*. We both heard the motion for a new trial, though absent at the argument on showing cause.

Rule discharged.

(a) See Cas. temp. Hardw. 301; *Arrowsmith v. Le Mesurier*, 2 New R. 211, 212; also *Ferry v. Adamson*, 6 B. & Cr. 528; *Bates v. Pilling*, ante, 231.

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WASNEY, Clerk, Executor of ANN ANDUS, *against*  
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Where an executor agrees with a legatee to allow him interest on his legacy if he will permit it to remain in his hands, it becomes a loan to the executor, for which he is personally liable at law, and cannot plead plene administravit in bar to an action by the legatee.

**A**SSUMPSIT. The fourth count of the declaration stated, that whereas heretofore and in the life-time of the said *Ann Andus*, and before the making of the promise of the said defendant hereinafter next mentioned, to wit, on 25th March 1817, to wit, in &c. one *Thomas Earnshaw* made and published his last will and testament in writing, and thereby, amongst other things, nominated and appointed the said defendant sole executor thereof, and thereby, amongst other things, devised and bequeathed to the said *Ann Andus* the sum of 100*l.* And the said *Thomas Earnshaw* afterwards and before the making of the promise herein after next mentioned, to wit, on &c. in &c. died, without altering or revoking his said last-mentioned will. And the said defendant afterwards and in the life-time of the said *Ann Andus*, and before the making of the promise hereinafter next mentioned, to wit, on 24th March 1820, proved the said will, and took upon himself the burthen of the execution thereof, and then and there assented to the said last-mentioned bequest to the said *Ann Andus*, and afterwards and after the proving of the said last-mentioned will by the said defendant, and after the payment of all the debts of the said *T. Earnshaw*, and all the other legacies in the said will mentioned, there remained in the hands of the said defendant, as executor as aforesaid, a sufficient sum of money, being assets of the said *T. Earnshaw*, wherewith the said defendant, as such executor as aforesaid, could and might and ought to have paid the said last-mentioned legacy of 100*l.* to the said *Ann Andus*, and before the making of the promise hereinafter next mentioned, to wit, on &c. in &c. assented and agreed that the said

*Ann Andus* was then and there entitled to demand and have of and from the said defendant, as executor as aforesaid, the said legacy of 100*l.* according to the last-mentioned bequest of the said *T. Earnshaw*, to wit, in &c. And thereupon afterwards, to wit, on 25th *March* 1821, to wit, in &c. in consideration of the premises, the said *Ann Andus*, at the special instance and request of the said defendant, suffered and permitted the said defendant to retain in his hands the said last-mentioned sum of 100*l.* so due to the said *Ann Andus* as aforesaid, and then and there lent him the same, upon the terms and conditions that the said defendant should pay the said last-mentioned sum of 100*l.* to the said *A. Andus* on request, and in the meantime should pay and allow her interest on the same at and after the rate of 5*l.* for the year, and the said defendant then and there had and retained the said last-mentioned sum of 100*l.* in his hands upon the terms last aforesaid, from thence until and at the time of the death of the said *Ann Andus*, to wit, in &c. And thereupon afterwards and after the death of the said *Ann Andus*, to wit, on 11th *April* 1833, &c. in &c. in consideration of the premises, and that the said plaintiff, as executor as aforesaid, at the special instance and request of the said defendant, would permit and suffer the said defendant to retain in his hands the said last-mentioned sum of 100*l.*, he the said defendant then and there promised the said plaintiff, as executor as aforesaid, to pay him the said last-mentioned sum of 100*l.* on request and interest thereon in the meantime, at and after the rate of 5*l.* by the year. Averment, that the said plaintiff, as executor as aforesaid, did afterwards, to wit, on &c. in &c. permit and suffer the said defendant to retain in his hands the said last-mentioned sum of 100*l.* upon the terms aforesaid; and although the said de-

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fendant was afterwards, to wit, on 12th Oct. 1833, to wit, in &c. requested by the said plaintiff, as executor as aforesaid, to pay him the said last-mentioned sum of 100*l.* and the interest due thereon, to wit, in the county aforesaid: Yet the said defendant not regarding &c., but intending to deceive the said plaintiff, as executor as aforesaid, in this respect, did not, nor would, when he was so requested as aforesaid, or at any time before or since, pay the said plaintiff, executor as aforesaid, the said last-mentioned sum of 100*l.* or any part thereof, or any interest for the same, but from thence hitherto hath wholly refused so to do, and still refuses to pay the same, or any part thereof, to the said plaintiff, executor as aforesaid, to wit, in &c. aforesaid.

The 5th count stated, that in consideration that the said plaintiff, as executor as aforesaid, would permit the defendant to retain in his hands a certain other sum of 100*l.* which the said defendant had before received for the use of the said *Ann Andus* in her life-time, as part of the personal estate of the said *T. Earnshaw* deceased, and which the said *T. Earnshaw* had bequeathed to the said *Ann Andus* in her life-time, and would lend the same to the said defendant, he promised the plaintiff, as executor as aforesaid, to pay the said sum of 100*l.* upon request, with lawful interest; and the said plaintiff did permit the said defendant to retain in his hands the said sum of 100*l.* and did then and there lend the said defendant the same upon the terms last aforesaid, and although the said defendant was afterwards, on &c. at &c. requested by the said plaintiff, as executor as aforesaid, to pay him the said last-mentioned sum of 100*l.* and all interest then due thereon &c. he hath hitherto wholly refused. Pleas: non assumpsit, and plene administravit. To the latter plea there was a general demurrer and joinder.

The point to be contended by the plaintiff was, that as the defendapt was sued, not as executor but in his personal capacity, the plea of plene administravit was bad in law.

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*Granger* for the plaintiff cited *Gregory v. Harman* (a) in support of the demurrer.

The *Court* then called on

*Hoggins* to support the plea. The declaration is bad, as there is no legal consideration laid for the promise; and secondly, the defendant's assent to the legacy, as executor, and his promise to pay it, are evidence of assets only, so that the plea of plene administravit is good, and plaintiff should have taken issue on it, and proved the assent and promise to pay. For even if this is a loan of money, such a loan by retainer is not a consideration for the promise, or laid as such. After stating the assent to the legacy, the declaration states, that in consideration of the premises the plaintiff permitted the defendant to retain the money, and then lent him the same. [Lord *Lyndhurst* C. B. It is "in consideration of the premises," that is, of what is there before stated, and upon the terms and conditions that the money lent should be repaid on request.] Then there are two considerations and two promises. [Lord *Lyndhurst*. That is right in form; the promise to pay is first laid to *Ann Andus*, and after her death to the plaintiff as her executor. A loan is distinctly averred. If *A.* has money of mine in his hands, and I say that

(a) 1 Moore & Payne, 209; and see *William Bane's case*, 9 Rep. 93; *Davis v. Reyner*, 2 Lev. 3; 1 Rolle's Abr. 24, pl. 33; *Goring v. Goring*, Yelv. 11; *Davis v. Wright*, 1 Vent. 120; *Trewinian v. Howell*, Cro. El. 91; *Quick v. Copleston*, 1 Sid. 242; *Reech v. Kennegall*, 1 Ves. 223.

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he may retain it, allowing me 5 per cent. for it, that transaction is valid as a loan. The mere fact of the money remaining in the party's hands does not show a loan, but if he retains it at interest in respect of a contract, it is different. Here it remains by virtue of such a contract. "In consideration of the premises" refers to all the antecedent matter, viz. that *Earnshaw* had money to pay all the legatees, and, having paid them all except this legatee, had money after that remaining in his hands. It is a contract that the executor should retain the legacy, paying 5 per cent. interest, and he did retain accordingly, under contract for lending it to him.]

In the first part of the count no loan of money is stated on the pleadings, and the promise is not laid to be in consideration of any loan, but in consideration that *Ann Andus* was entitled to demand the legacy, the loan being merely an act done in consideration of the premises on which the promise is raised; the latter part of the count merely means that the legatee would permit the 100*l.* legacy to remain in the defendant's hands.

Lord LYNDEHURST C. B. —When *Ann Andus* died she had suffered the defendant to retain it under the contract between them, and the defendant did retain according to that contract. That is a loan. It would be sufficient if it had been said that in consideration that *Ann Andus* would permit the defendant to retain money on certain terms, one of which was that he should pay 5 per cent. for it, that would be a special contract.

Judgment for the plaintiff (a).

(a) See *Gladow v. Atkin*, ante, Vol. II. 593.

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PEPPERELL *against* BURRELL.

**A** Rule had been obtained by *Follett*, for setting aside an interlocutory judgment for irregularity, in signing it before the time for pleading had expired. An order for seven days' time to plead was made 15th *May*, the pleas were delivered on the 22d, and judgment was signed at the opening of the office on the evening of that day.

An order having been made for seven days' time to plead, granted on 15th *May*, the defendant, on the 22d, delivered pleas which were irregular. The plaintiff afterwards signed judgment on the same day, being the 7th day, exclusive of that on which the order was granted. The court set aside the judgment as signed too soon on the 22d the defendant having all that day in which to plead a regular plea. Seven days' time for pleading, gives the whole of the seventh day to plead in, after excluding the day on which the order is made.

*Hutchinson* showed cause. The judgment was regularly signed, for two reasons; first, the pleas were delivered out of time on the 22d, time to plead under a judge's order being to be reckoned inclusive of its date, and exclusive of the day it expires; *Kay v. Whitehead*. (a) And *Gould J.* there cited from a MS. note, *Read v. Montgomery*, C. P. *Easter*, 26 *Geo.* 3., where an order for time to plead having been made on 16th *May*, a judgment signed on the 23d, for want of a plea, was held regular, on consulting the officers. *Freeman v. Jackson* (b) is not contrary. Secondly, the judgment might be signed on the 22d, as for want of a plea, on account of the irregularity in pleading two pleas without leave of a judge, pursuant to *Reg. Gen. Trin.* 1831, [ante, Vol. I. 533,] and for want of signature of counsel to the second, which concluded with a verification. The defendant's delivery of the pleas within the time allowed by the order, dispenses with the time otherwise required before signing judgment.

*Follett* in support of the rule. By *Reg. Gen. Hil.* 2 W. 4. No. VIII. [ante, Vol. II. p. 352,] the seven days not being expressed to be clear days, are to be

(a) 1 B. &amp; P. 480.

(b) 2 H. Bla. 35.

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reckoned exclusive of the first, and inclusive of the last day. Then the judgment was signed too soon on the 22d, the defendant having all that day to deliver his pleas in; and even if the plaintiff might have signed judgment for the irregularity pointed out, the plaintiff should not have signed it till the 23d; and had he waited till the proper day, the defendant might have got an order to plead several matters, and delivered another second plea regularly signed.

LORD LYNDEHURST C. B.—I accede to the position that the defendant had the whole of the 22d on which to obtain a judge's order to plead several matters, and to deliver a good plea signed in the regular way; whereas by the plaintiff's signing judgment on that day, the defendant was prevented from doing so; therefore as the judgment was signed too soon, it must be set aside.

ALDERSON B.—The plaintiff might have cured the irregularities of his pleas, if he had not been forestalled by the plaintiff's prematurely signing the judgment.

The other Barons concurring,

Rule absolute.

*MACHER against BILLING.*

A defendant who had obtained time to plead, and afterwards an

**B**AZETT had obtained a rule for setting aside an interlocutory judgment for irregularity, with costs. The defendant's order for seven days' time to plead order for particulars of plaintiff's demand, delivered a plea not signed by counsel, though concluding with a verification three days before the time for pleading expired. The plaintiff treated the plea as a nullity, and signed judgment the day before that on which the time for pleading expired: Held, that as the defendant had all that last day for delivering a plea signed by counsel, the judgment was signed too soon.

was dated 31st *October*, and did not expire till the 7th *November*; on the 3d *November* he obtained an order for the plaintiff to deliver particulars of demand, which by the practice gave him as much more time to plead, as he then had; *viz.*, four days more after the 7th (a). But on the 8th, the defendant, without obtaining an order to plead several matters, delivered a plea of the statute of limitations to the first count of the declaration, and the general issue to the residue of the causes of action in the declaration. The plea of the statute was not signed by counsel. On the 10th the plaintiff signed judgment.

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*Chilton* showed cause, that the defendant, by delivering his pleas, had waived the surplus time which he had to plead in, and that no order of a judge to plead several matters had been obtained; and that the plea of the statute of limitations was not signed by counsel.

*Bazett* in support of the rule. This is not a double plea, requiring an order to plead several matters; a plea of defendant's bankruptcy requires no signature of counsel (b). [*Parke* B. It concludes to the country, which distinguishes it from this plea of the statute of limitations, which concludes with a verification. The case however is not specifically provided for by *Reg. Gen. Hil. 2 W. 4. No. 107.* [*ante*, Vol. II. 350.] The officer certifies to us, that the plea of the statute required signature.] The defendant's time for pleading not being out till the 11th, he would have had the 10th and all the 11th to deliver a plea signed by counsel, had not the plaintiff signed judgment on the 10th. He cited *Pepperell v. Burrell.* (c)

(a) 13 East, 508; 4 B. & Cr. 970; Tidd, 9th edit. 469.

(b) 6 T. R. 496; 1 Chit. R. 225.

(c) *Ante*, p. 809.

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LORD LYNTHURST C. B.—That case seems precisely applicable. It is material that there should be a uniformity of proceeding on such a point; we will inquire the course of the other courts.

The judgment of the court was thus delivered the next morning by

PARKE B.—A discrepancy has been supposed to exist between the practice of the King's Bench and of this court, on the point whether, a bad or irregular plea, pleaded within the time allowed for pleading, could be treated as a nullity, so as to entitle the plaintiff to sign judgment immediately. Two old cases in the King's Bench show that such a plea might in that court be treated as a nullity, whilst *Pepperell v. Burrell* (a) was decided in this court a contrary way in last term. We think that that decision of this court is the right one; and consequently that the judgment in this case was signed too soon.

Rule absolute.

(a) *Ante*, p. 809. This case was decided in Michaelmas term 1834, but having confirmed *Pepperell v. Burrell*, is placed next to it.

### PHILLIPS *against* ENSELL.

Where it is sought to set aside a declaration and all subsequent proceedings on an affidavit of defendant that he was not personally served with process, and of his brother who lived in the house, that the writ was served on him by mistake on two occasions, the proceedings will stand unless it is sworn for the defendant that the copy served did not reach his hands, or come to his possession, or was not shown him by his brother.

**A**DDISON moved to set aside the declaration and subsequent proceedings with costs for irregularity, in not having personally served the writ on the defendant. He stated, first, that the defendant had not been served with the copy of any process; and secondly, that the declaration was served too early. The de-

claration was served with process, and of his brother who lived in the house, that the writ was served on him by mistake on two occasions, the proceedings will stand unless it is sworn for the defendant that the copy served did not reach his hands, or come to his possession, or was not shown him by his brother.

defendant swore that he never was served with any copy of a writ of summons. His brother, who lived in the same house, swore that a copy of the writ was served on him on the 20th *May*, and that he immediately sent it back by the post to the plaintiff's attorney, informing him that he had had no conversation with the defendant about it. A copy was again served by the same person on the brother on 28d *May*, when defendant was in bed. The declaration was delivered on 31st *May*. *Thomson v. Phenev* (a) having been cited, *Parke* and *Alderson* Bs. severally dissented from it as being contrary to their experience in K. B. and C. P., and the latter mentioned *Rhodes v. Innes* (b). A rule having been granted in order that the question might be considered,

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*Hutchinson* showed cause. The defendant, who resides in the same house with his brother, does not swear that the copy never came to his hands on either occasion, or that he had no notice of either of the services which was mistakenly made on his brother; nor does the brother swear that he did not acquaint his brother of the second service on himself. The defendant's personal knowledge of a writ is, for the purposes of this species of service, equivalent to personal service. Thus, in *Rhodes v. Innes* it was held that service on the son who said his father was in the house, and should receive the process, was sufficient, the father having then been long eluding the writ. [*Alderson* B. Nothing shows that the copy ever reached the defendant. If the affidavit on which this judgment was signed was not in the ordinary form, stating personal service on the defendant, he should have showed it was not, and he not having done so, it must be presumed to

(a) 1 Dowl. P. Cas. 441, *Patterson J.*

(b) 7 Bing. 329.

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be in the ordinary form. If, on the second occasion, the brother delivered the copy over to the defendant, can personal service be doubted?] The declaration was regular, having been delivered on the 31st, after a first service on the 20th.

*Addison* supported the rule. Not only is no personal service shown by the plaintiff, but the defendant swears it never took place. [*Gurney* B. It is quite consistent with the brother's affidavit, that before the brother sent the first copy served back to the plaintiff's attorney he had *showed* it to his brother.] *Thompson v. Phenev* (a) is a stronger case than this. There the copy of the writ was left in the shop with a servant, and though the defendant was in an inner room within hearing, the service was held insufficient, and not personal. [*Alderson* B. There the servant said, "mind, it is no service," and I should not conclude that he did what he refused to do.] In *Rhodes v. Innes* personal service must have been inferred from the expressions of the son. [*Alderson* B. In that, as in this case, there was an affidavit denying personal service.] Secondly, by the second service the plaintiff appears to have abandoned the first, and the probabilities are greater that personal service took place, if at all, on the second occasion. If so, the declaration was delivered too soon.

BOLLAND B.—I conferred with my brother *Patteson* as to the case of *Thomson v. Phenev*. It was an application on special affidavits intended to take his opinion whether the service in that case was good, so as to enable the plaintiff to enter an appearance on it. Therefore, as that case does not affect the decision of *Rhodes v. Innes* in the full court of Common Pleas, where the

(a) 1 Dowl. Pr. C. 441.

service was held sufficient, and, upon that authority, I think this rule ought to be discharged.

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ALDERSON B.—I am also of opinion, on the authority of *Rhodes v. Innes*, that this rule should be discharged. In both cases affidavits are made denying personal service. Even if the personal service intended to be made by the person employed for that purpose had never taken place, yet the appearance must have been entered by the plaintiff for the defendant under the statute 12 Geo. 1. c. 29. on the usual affidavit of personal service on the defendant; now he does not swear, on the other hand, that the process has never reached him or been in his possession. We think his affidavit, that he was never “personally served” with it, does not counterbalance the usual affidavit for the plaintiff. *Rhodes v. Innes* may be distinguished from *Thompson v. Phenev*, for in the latter case it is not improbable that the copy did not reach the defendant. But if no such distinction had existed, I should have adhered to the rule laid down in *Rhodes v. Innes* by the court of Common Pleas, and have held this to amount to personal service.

GURNEY B.—We entertain no doubt that the service on the 20th, the first occasion, was sufficient. As the defendant does not swear he did not get the copy, it must, I think, be taken that he did.

Rule discharged.

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DUNCAN *against* GRANT.

Where any plea is pleaded besides the general issue, a notice of set-off will not enable the defendant to give in evidence the matters of his set-off under 2 Geo. 2. c. 22. s. 13. without pleading it.

**D**EBT to recover a sum of 4*l.* 10*s.* Pleas : nil debet as to all but 1*l.*, and a tender of that 1*l.*, with notice of set-off for 3*l.* 10*s.* money lent, and the statute of limitations ; 1*l.* was paid into court. At the trial before the under-sheriff the tender was admitted, but it was objected for the plaintiff, that as there was no plea of set-off, no items of set-off could be proved for the defendant. Here, there was another plea on the record besides the general issue. The under-sheriff having directed a verdict for the plaintiff, a rule was obtained for a new trial on the ground of misdirection and rejection of evidence.

*Walesby* showed cause. In *Webber v. Venn* (a) *Abbott C. J.* said, "It ought to be generally known that where any plea is on the record besides the general issue, the set-off cannot, by the terms of the statute 2 Geo. 2. c. 22. s. 13. be taken advantage of, unless pleaded."

*C. Jones* contra. In the previous case of *Coulson v. Jones* (b), Lord *Ellenborough* heard counsel on both sides, and referred to the statute; after which he was of opinion that there were no restrictive words in it confining the right to give a notice of set-off to the case where the general issue is pleaded alone, and that where the general issue was pleaded with different pleas, the defendant might give evidence of set-off under a notice of set-off. In *Webber v. Venn*, the event did not turn on this point.

**BOLLAND B.**—In determining the weight of the conflicting authorities, I am inclined to accede to Lord

(a) Ry. &amp; M. 413.

(b) 6 Esp. 50.

*Tenterden's* opinion, as being at once more consistent with the words of the statute, and not likely to have been expressed by him in the manner it was, had he not formed a deliberate opinion on the subject contrary to that of Lord *Ellenborough*.

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ALDERSON B.—It is probably better to adhere to the latest authority on the point. The words of the act 2 *Geo. 2.* c. 22. s. 13. are, that where there are mutual debts between the plaintiff and defendant, or if either party be sued as executor or administrator where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, “so as at the time of his pleading the general issue” when any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due or otherwise, such matter shall not be allowed in evidence upon such general issue. Now the fair meaning of the clause taken together seems to be, that when the general issue only is pleaded, the matters of the set-off may be given in evidence on a notice; but that if any special plea is pleaded, the set-off must also be pleaded. I therefore think Lord *Tenterden's* opinion the best founded.

GURNEY B. concurred.

Rule discharged.

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GREGORY *against* TUFFS.

A new trial will be ordered after a verdict for the defendant in a penal action, if the jury find their verdict against all the evidence in a cause on a misapprehension of the law, whether arising from their own mistake or the misdirection of a judge.

DEBT on 25 *Geo. 2. c. 36. s. 2.* (made perpetual by 28 *Geo. 2. c. 19.*) for a penalty of 100*l.* for keeping an unlicensed room for public dancing and music. At the trial before Lord *Lyndhurst* C. B. at the *Middlesex* sittings after last *Michaelmas* term, it was proved that the defendant kept a public-house in *East Smithfield*, and that on repeated occasions, during a space of three or four months, the tap room was frequented at night by numbers of sailors, soldiers, boys and prostitutes, who danced there to a violin played by a person on an elevated platform. It did not appear that money was taken at the door. The plaintiff's witnesses were paid six shillings per day to obtain the evidence necessary to support his case, but were not contradicted in any particular. The learned chief baron told the jury that a mere temporary or occasional use of the room for music and dancing would not be a keeping it within the act, but that it was not necessary for the plaintiff to prove that it was used exclusively for those purposes, or that money was taken at the door (*a*). He left it to them whether the room in question was "kept" for public dancing; adding, that the plaintiff's witnesses, who might have been contradicted but were not, had sworn to facts which, in his opinion, amounted to a breach of the law. The jury, before giving their verdict, were furnished with a copy of the act 25 *Geo. 2. c. 36.*, whether by consent of both sides, or after the chief baron and counsel had retired, did not clearly appear at the time of moving for a new trial. The verdict was for the defendant. *Follett*, in *Hilary* term, moved in this case (*b*) for a new trial, on the

(*a*) *Archer v. Willingrice*, 4 Esp. 186.

(*b*) Also in *Gregory v. Taverner*, tried before Gurney B. at the same sittings, with a like result. The jury had obtained the act after retiring.

ground that the verdict was contrary to the direction of the judge in point of law to all the evidence. [Lord *Lyndhurst* C. B. Whether the verdict was contrary to law or not, would depend on the facts which were incontrovertibly proved. *Bayley* B. After a verdict for a defendant on a penal action, a new trial will not be granted, though the verdict is against the evidence, unless the judge misdirected the jury in point of law; *Brooke* q. t. v. *Middleton* (a). The courts have for this purpose considered penal in the light of criminal proceedings, except in the cases of quo warranto informations (b). Lord *Lyndhurst* C. B. In *Brooke* v. *Middleton* the court were inclined to grant a rule, but thought they had no power to do so, recognizing *Fonnereau* v. *Bennet* (c), where it was said that the rule had been laid down for fifty years past not to grant new trials in actions on penal laws, where the verdict was for the defendant. The ground here taken is, that though there was no misdirection of the judge in point of law, the jury took on themselves to decide, not on the facts but on the law, under an erroneous idea of what it was. Now one particular benefit of trial by jury is, that they have authority to decide the fact, subject to the direction of the judge in point of law, in order that if he misdirects them, his error may be afterwards set right; but there could be no security for the rights of parties if juries were permitted to take on themselves to decide on the law. *Alderson* B. They are judges both of law and fact, when mixed together. Lord *Lyndhurst* C. B. Had they been questioned whether their verdict turned on their disbelief of the witnesses, or on their construction of the act of parliament, and they had rested it on the latter, the principle of


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(a) 10 East, 268.

(b) *Rex* v. *Francis*, 2 T. R. 484.

(c) 3 Wils. 59, A. D. 1770.

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Brooke v. Middleton would apply, and the case would be analogous to a misdirection. There is some evidence to show that their verdict proceeded on a misapprehended construction of the act, with which, perhaps, they should not have been furnished. If we were quite satisfied that they could only have found their verdict on the point of law, we might interpose.]. The judge was bound to put a construction of law on the statutes, and the jury to take it from him as such. It is not easily reconcilable to reason why a jury should have different functions in penal from other actions.

Platt showed cause. If the jury disbelieved the witnesses, then, though bound to take the law from the judge by way of exposition, they could not apply it to facts which in their view did not arise.

Follett in support of the rule mentioned *Rex v. Sutton* (a).

LORD LYNDEHURST C. B.—It is clear from *Wilson v. Rastall* (b) and *Calcraft v. Gibbs* (c), that where on the trial of a penal action there is a mistake in the judge's direction in point of law, a new trial *may* be granted. The only ground for a new trial in this case would arise, if the court, under all the circumstances, should arrive at a clear conviction, that the jury have by an act of their own misapprehended the law on the subject. Assuming that to be satisfactorily established as a fact, there appears no difference in principle between a case which has had an erroneous result in consequence of a mistake of the jury in point of law, and one in which it has been occasioned by the like mistake of a judge. In this case we at first inclined to refuse the rule, thinking

(a) 5 B. & Adol. 52. (b) 4 T. R. 753. (c) 5 T. R. 19. 3 T. R. 555.

the verdict had been found only on the question of fact submitted to the jury, but an affidavit has been produced that they obtained the act of parliament after they had retired and received my direction in point of law. The general question is therefore raised, and we will lay down no rule which may be considered new without consulting the other judges. It is clear we could not grant a new trial on the ground of the jury's misapprehension of a fact; but on their mistake in point of law, if well established, we may. First, we must be satisfied that the verdict was founded on misapprehension of law, which is a question for this court. Secondly, if so satisfied, we shall consider whether we ought to grant a new trial in a penal action, and on this latter point we will consult all the judges.

On a subsequent day the judgment of the Court was thus delivered by

Lord LYNTHURST C. B.—It has not been usual for courts of justice to grant a rule for a new trial in penal actions, where a jury has found a verdict for a defendant on a question of fact, but new trials have been ordered in such cases, where there has been misdirection in point of law by a judge, because the jury had been misled in point of law. In the present case we are satisfied as well from the clearness of the facts as from what took place with the jury, that their verdict was founded, not on any misapprehension of the fact, but of the law. We have conferred with the judges of the other courts, who concur with us in the principle which I have stated.

Rule absolute for a new trial.

Same rule in *Gregory v. Tuverner*.

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A local act directed that no person should be capable of "acting as a commissioner in execution thereof, in any case wherein he should be personally interested in the matter in question," and that any person who should so act as a commissioner, being so disqualified, should forfeit 100*l*. The commissioners were

in part elected by parishes within a certain precinct. An order had been made by them for constructing a footway along the frontage of the defendant's, among other, premises in a particular manner. The defendant, who was afterwards elected a commissioner, attended at a special meeting of the commissioners, and first moved to rescind the order as to all except his own premises, which was negatived. On a motion being made to alter the order, by adopting a less expensive mode of paving, he supported the proposition in a speech, and took an active part in the discussion, and in opposing the original order. He then proceeded to the ballot with the other commissioners. In an action of debt for the penalty, there was a count charging the defendant with acting as a commissioner in a matter where he was personally interested, and voting accordingly. Another count only charged him with acting as such commissioner in a matter in which he was personally interested. The jury found that the defendant did not vote on the occasion in question, and gave him a verdict. Held, that he did not act as a commissioner in proposing the rescinding the order, except as to his own premises, but that there was evidence that he had "acted" as a commissioner by addressing the meeting on the motion for altering the order, and by taking an active part in the discussion; and that as the only question left to them was, whether he had voted, and not whether he had acted as a commissioner in any other manner, he was entitled to a new trial.

The evidence of a person who proceeds to a ballot is admissible as to the share he personally took in it.

Semble, the addressing commissioners of paving by a commissioner in complaint of a grievance affecting him individually, is not "acting" as a commissioner.

DEBT on 9 *Geo.* 4. c. xxvii. (local act) for a penalty of 100*l*. The declaration stated, that heretofore and before and at the times when the defendant acted as a commissioner as hereinafter mentioned in the city of *Lincoln* and county of the same city, the defendant was a commissioner for carrying into execution the act hereinafter mentioned. That heretofore, to wit, on the 24th *July* 1833, in the city &c. at a meeting of commissioners for carrying into execution an act of parliament passed 9 *Geo.* 4. and intituled, "An act for paving, lighting, watching and improving the city of *Lincoln*, and the *Bail* and *Close* of *Lincoln*, in the county of *Lincoln*, and for regulating the police therein," then and there held at the *Guildhall* in the city of *Lincoln*, it was then and there ordered by the commissioners at-

tending the said meeting, "that a footpath of flag stones of two flags or four feet in width, with a four-inch kirk on the outer edge, be made in front of the buildings, yards and premises along the whole line of wharfs or roads on the east and north sides of *Brayford*, with *Mount Sorrel* crossings of the same width, to the gateways, lanes, and openings, and that the necessary notices be given to the occupiers." And the plaintiff avers that at the time of making the last-mentioned order, and from thence, until, and at the time of the defendant's acting as a commissioner as hereinafter mentioned, he the defendant was the occupier of certain premises, that is to say, certain yards and buildings on the north side of *Brayford*, and then and there being within the jurisdiction of the said act, and lying before and adjoining the said line in the said order mentioned, the same line being then and there a public place, also within the jurisdiction of the said act, and as the occupier of such premises, he the defendant was, during all the time last aforesaid, one of the occupiers in the said order mentioned, subject, according to the said act, to make part of the said footpath, and also one of the occupiers mentioned in the proposal hereinafter mentioned to have been made for the alteration of the said order. That afterwards, to wit, on 26th Oct. 1833, in &c. at a special meeting of the said commissioners then and there held, it was proposed that the said order made at the said meeting held on the 24th day of *July* &c. should be altered to the following effect, namely, "that the occupiers of buildings, yards and premises along the whole lines of wharfs or roads on the east and north sides of *Brayford*, be ordered to make footpaths the whole length of their respective frontages with small stones and gravel, with a four-inch kirk, and that

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the making footpaths in that manner with *Mount Serres* crossings should be deemed a compliance with the said order;" and at the last-mentioned meeting, so held as last aforesaid, it was also then and there proposed, that the said original order be acted upon and put in execution. And the plaintiff further saith, that the said footpath so proposed as aforesaid, was at the time of the last-mentioned meeting, and when the defendant acted as a commissioner as hereinafter mentioned, a footpath which could be made with less expense than the said footpath in the said order mentioned, and that the defendant, as such occupier as aforesaid, was during the whole of the last-mentioned meeting, by reason of the said greater cheapness of the said footpath so proposed as aforesaid, personally interested in the question, whether the said original order should be so acted upon, or so altered as aforesaid. And the plaintiff further saith, that he the defendant then and there being so personally interested as aforesaid, well knowing the premises, but not regarding the said statute, did at the said meeting lastly mentioned, in the city and county aforesaid, act as a commissioner in the execution of the said act, in the matter in which he was so interested as aforesaid, in this, that he the defendant, at the last-mentioned meeting then and there being so personally interested as aforesaid, did, as such commissioner as aforesaid, act in execution of the said act on the occasion aforesaid, and did then and there vote for the alteration of the said original order, according to the said proposal, contrary to the form of the statute in such case made and provided, whereby and by force of the statute the defendant hath forfeited the sum of 100*l.* &c.

The second count stated that the defendant did act as a commissioner under and in execution of the said

act in the matter in which he was so interested as aforesaid, in this, that he the defendant at the said last-mentioned meeting, then and there being so personally interested as aforesaid, did, as such commissioner as aforesaid, acting under and in execution of the said act as aforesaid, take part in the discussion of the question, whether the said original order should be so acted on, or so altered as aforesaid, contrary, &c. (concluding as in first count). The third count stated that the defendant acted as a commissioner in execution (&c. as in first count) in a case wherein he the defendant, at the time of so acting as aforesaid, was personally interested in the matter in question, contrary, &c. Plea : nil debet. The trial of this case having been removed under 38 G. 3. c. 52. s. 1. from the county of the city of *Lincoln*, where the venue was laid, to the county of *Lincoln* at large, it was tried before *Tindal* C. J. at the last Spring assizes for *Lincolnshire*, when the following appeared to be the facts of the case :—

By 9 Geo. 4. c. xxvii. s. 13. no person shall be capable of “ acting as a commissioner in the execution of this act ” during the time he shall hold or enjoy any office or place of profit under this act, or be concerned or interested, except as a creditor, on the rates or assessments, or as a shareholder in any company of proprietors for the manufacture of gas, in any contract made under or by virtue of this act, *or in any case wherein he shall be personally interested in the matter in question*, and if any person not being qualified in the manner by this act directed &c., *or not being or becoming disqualified* by any of the causes in this act mentioned, shall act as a commissioner in the execution of this act, every person shall for every such offence forfeit and pay 100*l.* with full costs of suit, to any person who shall sue for the same in a superior court by action of debt or on the case &c.” The act

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provided also that every occupier should pave his frontage.

The defendant had a wharf and yard on the north side of *Brayford*, along which the footpath and crossings directed to be made by the order stated in the declaration ran, and was thus personally interested. About 8th Aug. 1833 he was appointed a commissioner by the parish where he resided, was sworn in on the 24th, and inquired of Mr. *Mason* the clerk how to proceed to get the order of the 24th July, set out in the declaration, rescinded. On 26th Oct. a special meeting of the commissioners was held, pursuant to notice, at which the defendant attended and proposed to rescind the order of the 24th July, except as far as it regarded his own property. That course being rejected, a motion was made that the order of 24th July be altered to the following effect, viz. that the occupiers of buildings, yards, and premises along the whole lines of wharfs or roads, on the east and north sides of *Brayford*, be ordered to make footpaths the whole lengths of their respective footways, with small stones and gravel, with a 4-inch kirk, and that the making footpaths in that manner with *Mount Sorrel* crossings shall be deemed a compliance with the said order. The original order was moved by way of amendment. The defendant spoke in favour of it, and against the amendment, i. e. the order of 24th July as it originally stood, taking an active part in the discussion of the questions. He with the other commissioners afterwards received a balloting ball, held it up to the plaintiff, and took it into another room where the box was. Thirty-two commissioners were present. After the balloting, twenty balls were found in one drawer of the box and eleven in the other. The thirty-second ball was found in another drawer, where it had been placed by mistake. The numbers were twenty for altering the order

of 24th July in the manner proposed, and eleven for the amendment, which sought to establish that order as it stood at first.

At the trial the plaintiff, to show that the defendant voted by balloting in favour of the motion, offered to call the ten commissioners who with himself (the plaintiff) voted for the amendment in the minority, as well as M. another commissioner, to prove that he intended to ballot on the same side, but by mistake put his ball in a wrong drawer. For the defendant, it was objected that the proposed proof of voting was irrelevant, and that the evidence of the commissioner as to what he intended to have done with the ball was inadmissible. The chief justice said, that the plaintiff might prove that the defendant had voted on the occasion in question, but that it seemed immaterial which way he voted, for if he was interested he had no right to vote at all, and if the jury should be satisfied that he voted at all, that was such an acting as a commissioner as would make him liable to a penalty if personally interested in the matter in question. Having added, that if the misplaced ball was the defendant's it was no voting, and that there was no evidence of "acting" but by voting, he left it to the jury to say whether the defendant had voted.

The jury found a verdict for the defendant that he had not; the chief justice afterwards gave the plaintiff leave to move to enter a verdict for a penalty on the third count, which only stated the defendant to have acted as a commissioner in execution of the act, in a case in which he at the time of such acting was personally interested, without alleging that he so acted by "voting."

Early in *Easter term* *Balguy* for the plaintiff, moved to set aside the verdict, and to enter it for the plaintiff on the third count for one penalty, or for a new trial, ac-

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According to the leave reserved, and for misdirection in telling the jury that there was no evidence of acting but by voting, and in not directing them to find for the plaintiff on the third count; on the ground, he argued, that taking a prominent part in a debate was alone sufficient proof of "acting" within s. 13; and on affidavit of surprise and exclusion of testimony. A rule having been granted, *Adams* Serjt. for defendant, also obtained leave to argue a point urged as ground of nonsuit at the trial, viz. that the action was brought without proper notice, as required by s. 159.

Adams Serjt. and *Amos* shewed cause in this term. [*Parke* B. The only question is, whether what is stated in the evidence amounts to an "acting" within the statute or not? If it does, it would only entitle the plaintiff to a new trial and not to enter a verdict. The jury have found that the defendant did not vote, so that if the plaintiff had witnesses to prove that he must have done so, they should have been brought forward at the trial.] If speaking be acting, then if a commissioner spoke against his own interest, it would subject him to penalties; or if he appealed as over-rated. If the defendant was disqualified by interest from acting on this occasion, the act itself may become waste paper, and the business could not be carried on at all, or would be ruled by a small junta. The commissioners consist of the mayor, the dean and chapter, who are commissioners ex officio, and need not be resident, and of other persons elected by each parish in respect of property possessed by them in it. Now, though these commissioners might order the repair of footways over the whole city at once, yet, according to the argument, each of them would be liable to this penalty. Can it be said that because all are interested, none are? If a commissioner is held to be "personally interested" in

every parish where he has property, the act can, in hardly any instance, be carried into operation. It will be sufficient to apply those terms to cases where he has an individual interest in the particular transaction, *e. g.* an appeal against the amount of rates made under the act. Now, as the commissioners *ex officio* need not be qualified by property, or be resident, they may not be liable to rates, whereas, every parochial commissioner must be personally interested in them and would be excluded. [*Parke B.* It is not clear which way they may be interested, unless the party states it: for the making a public path in the more expensive of two methods may be the most beneficial course, and though it costs more, may return money's worth. That differs the case from those put of individual interests in the amount of a rate, &c.] How can he vote on questions of rates for watchmen, lamps, &c.? [*Parke B.* With respect to those rates which fall on the whole body, every commissioner is in the same situation as every other person. The sense of acting as a commissioner must therefore be limited to cases where the party's interest is personally or individually affected by the matter in question.] On the point of notice, *Parke B.* was understood to say that the clauses had no reference to actions for penalties incurred by direct violation of the act (*a*), but only to acts done under colour of it (*b*). The verdict made it unnecessary to moot another point made at the trial, that the defendant had no such interest as would disqualify him.

Balguay, Hill and Follett contrà. First, the ample evidence which was tendered to show that the defendant voted, was rejected; secondly, as the de-

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(a) See per *Bayley J.* in *Cook v. Leonard*, 6 B. & Cr. 355; *Morgan v. Palmer*, 2 B. & Cr. 729, and 4 T. R. 485, 553.

(b) *Graves v. Arnold*, 3 Camp. 242; *Stiles v. Cox* bart., Vaugh. 111; *Butler v. Ford*, ante, Vol. III. p. 677.

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defendant might "act" most efficiently for the purpose of influencing other commissioners without voting, the jury should have been told that there was evidence of acting; for discussing the question as a commissioner was alone an acting as such. This defendant also took a ball in order to ballot as such. [*Parke B.* If the chief justice was not asked to take a note of the evidence tendered, his attention might not be called to it; and if so, it is hard to reverse a verdict obtained in absence of argument or pressure on that particular point. I think *M.* the commissioner, was an admissible witness, to show what share he personally took in the balloting.] The objection was urged during the summing up and produced the leave to move afterwards given. The question, whether he acted, was not left to the jury upon that part of the evidence which was distinct from that on the question whether he voted, and which they found in the negative. This was a meeting consisting exclusively of commissioners. [*Parke B.* Suppose a man in a private capacity to have wished to state his case to the commissioners, was this clearly a meeting at which no one but a commissioner could be present, or, being present, speak? Again, was a commissioner, who, as an individual, objected to an expensive footway opposite his premises, to be precluded from so objecting by the circumstance of being a commissioner? He proposes to leave the obnoxious order untouched as to his own premises. Then he does not act by moving to rescind that order, and leaves the meeting in the same situation as before.] By s. 155. the appeal is to the sessions, not to the commissioners; unless he could not act without voting, the question, whether he acted at the meeting in his private or public character, would be for the jury to infer from his conduct there. The only persons there were the commissioners and their clerk. A man may counteract the ob-

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jects of the statute, which were to prevent his acting in cases where his private interest was concerned by procuring votes, though he does not vote himself. There was evidence not only that he acted by discussing the questions mooted, but that he voted. [*Parke B.* Acting as a commissioner, means doing any thing whatever in that character; *e. g.* attending their meeting to form a quorum, or speaking.] Here the defendant was individually interested in the amount of tax to be laid on him. As to orders affecting the whole city, the commissioners would not be interested in them personally or individually, but in common with the other inhabitants.

Cur. adv. vult.


On the last day of the term the judgment of the court was thus delivered by

PARKE B.—This was an action to recover a penalty imposed by a local act, which by one of its clauses directed, that if any person disqualified from acting as a commissioner in execution of the act, by being personally interested in the matter in question, should act as such commissioner, he should forfeit 100*l.* There were several counts in the declaration, to the third of which, charging the defendant simply with acting as a commissioner, being personally interested in the matter in question, the attention of the learned judge does not appear to have been sufficiently drawn, at all events, at the proper time. It appeared that there were thirty-two commissioners in *Lincoln* for carrying the act into effect, of whom the mayor and dean and chapter were commissioners *ex officio*, and the rest were elected, two by each parish in the city in respect of qualification by property in the electing parish. The defendant was one of the commissioners so elected. At a former

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meeting, an order had been issued by them for making the footway in question, which passed in front of the defendant's among other premises, with somewhat expensive materials: and the meeting in question was called by notice to reconsider that order, and propose a cheaper kind of path. At this meeting the defendant moved to rescind the original order, except as respected his own premises. What he did on that occasion cannot be considered as acting as a commissioner, being personally interested in the matter. A motion was then made for doing the work in question in a different manner from that pointed out by the original order. The defendant then spoke in favour of it as preferable, from requiring less expensive materials, and against the original order of *24th July*, which had been moved as an amendment. He afterwards proceeded to ballot with the other commissioners for adopting or rejecting the motion for a cheaper path. On examining the ballot-box, twenty balls were found for the motion, eleven against it, and the remaining one ball which had been dropped into a wrong drawer. The learned chief justice left it to the jury that there was no evidence of the defendant's acting as a commissioner unless he had voted as such, and left it to them whether he had so voted. The jury, not being satisfied that the defendant had so voted, gave him a verdict. Had the case rested on the evidence of the voting only, we should not have disturbed their finding; but the voting was said to be the only evidence of the defendant's having "acted" as a commissioner, whereas his having taken part in the discussion on the motion for the less expensive mode of paving, should have been left to the jury as evidence applicable to the question on the third count, whether he acted as a commissioner on that occasion or not. If he had taken part in the discussion merely as pointing out that such and such

course would individually injure him, that would not have amounted to an "acting" as a commissioner; but as he attended as a commissioner and used influence over others by his words and actions in that character, it should have been submitted to the jury whether what he so did was or was not an "acting" as a commissioner within the act. We are therefore of opinion that there should be a new trial in this case. There is here no doubt that the defendant was personally interested. Cases might exist where nearly all the commissioners would be equally in the situation of persons personally interested in the matter in question. Here, the only question was, whether in what he did he acted as a commissioner under the act in question? and that is a proper question for a jury.

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Rule absolute for a new trial.

See *Towsey v. White*, 5 B. & Cr. 125; *Faulkner v. Elger*, 4 B. & Cr. 449, 455.

THOMAS *against* EDWARDS.

KELLY applied to the court to enlarge the time for moving for a new trial in this case, which had been tried before an under-sheriff, on the ground that he had not yet sent up his notes of the trial according to repeated promises. He said that in a case in the King's Bench a similar motion had been granted.

PARKE B.—Take a rule. If the under-sheriff refuses to send his notes, the facts proved at the trial should be laid before the court by affidavit(a).

(a) See *ante*, 870, *Johnson v. Wells*. And *Burney v. Maunson*, 1 Adol. & Ell. 348. n.

the facts proved at the trial to be laid before it on affidavit.

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NICHOLLS and Another *against* CHAMBERS.

On 23d *May* the plaintiff had a verdict in a cause tried before a sheriff on a writ of trial issued under 3 & 4 *W. 4. c. 42. s. 17.* He did not sign judgment till the 27th, after taxing costs on that day. Held, that the judgment was signed regularly and in time within the term "*forthwith*" in sect. 18.

THIS cause was tried before the under-sheriff on 22d *May*, the first day of this term, under a writ of trial, pursuant to 3 & 4 *W. 4. c. 42. s. 17.* The jury process was returnable 21st *May*. The plaintiff having obtained a verdict, the costs were taxed, and judgment signed on the 27th. A rule having been obtained by *Comyn* for setting aside the judgment and all subsequent proceedings for irregularity with costs,

Kelly showed cause. As there was no certificate on the writ of trial by the sheriff before whom the cause was tried, or any order by a judge that judgment should not be signed, or that execution should be stayed till the defendant should have had an opportunity to apply to the court for a new trial, the plaintiff was entitled, pursuant to s. 18. of 3 & 4 *W. 4. c. 42.* to sign judgment and issue execution at the time he did. No rule for judgment was necessary. *Reg. Gen. Hil. 2 W. 4. No. 67.* [*Ante*, Vol. II. p. 346.]

Comyn, contra. Sect. 18. of 3 & 4 *W. 4. c. 42.* enacts, that at the return of any such writ of inquiry or writ of trial of such issue or issues as aforesaid, costs shall be taxed and judgment signed, and execution issued *forthwith*, unless such sheriff, or his deputy, before whom such writ of inquiry may be executed, or such sheriff deputy or judge, before whom such trial shall be had, shall certify under his hand upon such writ, that judgment ought not to be signed, until the defendant shall have had an opportunity to apply to the court for a new inquiry or trial, or a judge of any of the said courts shall think fit to order that judgment or execution shall be stayed to a day to be named in

such order, and the verdict of such jury on the trial of such issue or issues *shall be as valid and of the like force as a verdict of a jury at nisi prius*. The latter clause confines the operation of the verdict to the ordinary rule by which the losing party at nisi prius has four days in term to move for judgment, or in arrest of judgment or for a new trial, before the plaintiff can tax costs and sign judgment. As the plaintiff did not avail himself of the former part of the statute, to have immediate execution without getting costs, but waited till the 27th to tax the costs, that ordinary rule applies. So, though under 1 W. 4. c. 7. immediate execution might have been obtained, the costs must have been given up.

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BOLLAND B.—I am of opinion that this rule should be discharged. A verdict obtained on a trial had under this act does not stand in the same situation as if obtained at nisi prius. The latter part of the section does not exclude the effect of its earlier words, and is quite consistent with them.

ALDERSON B.—I am of the same opinion. “Forthwith” merely means that the plaintiff shall tax his costs, sign judgment, and issue execution as soon as he can; and his omitting to sign judgment and issue execution immediately after the trial, is no waiver of his powers to do so when he conveniently can, viz. as soon as he can get the costs taxed.

GURNEY B. concurred.

Rule discharged with costs as moved.

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HAMMOND *against* THORPE.

After a defendant has consented to withdraw a juror, and consequently to pay his own costs, it is too late to move that the plaintiff's attorney do pay his costs of defence on the ground that the plaintiff never authorized him to sue the defendant.

TRESPASS quare clausum fregit. *Plea*, leave and licence. At the trial a juror was withdrawn at the suggestion of the judge. A rule had been obtained by *Thesiger*, calling on the plaintiff's attorney to show cause why he should not pay the defendant's costs of defending the action. The defendant's affidavit stated, that the plaintiff had never in fact authorized the bringing the action, but, being illiterate, had been prevailed on by his attorney to sign an authority to sue the defendant, without being informed of the object and intent of the paper signed. The affidavits contradicting the above were produced by *Erle* on the other side.

ALDERSON B.—The first question is, whether after the defendant had agreed to pay his own costs, by consenting to withdraw a juror, he can now claim them from another in the person of the plaintiff's attorney. If the grounds here stated were substantiated by the affidavits, they would have enabled the defendant, had he obtained a verdict on the trial, to apply to us, in case of the plaintiff's insolvency, to place his attorney in the room of the plaintiff, and make him liable to the costs incurred by the defendant; but the defendant has here chosen to take his own costs on himself, and cannot now charge another person with them. No instance of such an application is cited; besides, the defendant's affidavits are answered.

Per Curiam.—Rule discharged with costs.

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LAKIN and two Others, Executors of WATSON, against
MASSIE.

THIS was an action against the maker of a promissory note dated 9th April 1827, by three of the executors of the maker. On 4th April 1833, a writ of summons issued at suit of the above three plaintiffs, who afterwards declared; but on the defendant's pleading in abatement the nonjoinder of *F. W.* the remaining executor, a rule was obtained calling on the defendant to show cause why the writ of summons and the declaration should not be amended by adding the name of *F. W.* as a co-plaintiff. It appeared from the plaintiffs' affidavits, that if the amendment was not allowed, the debt would be lost.

No amendment of a writ of summons will be permitted except in a case where the plaintiff's demand would otherwise be barred by the statute of limitations.

Whateley showed cause. The merely stating the date of the note in the affidavit does not necessarily prove that the debt would be barred by the statute of limitations if the amendment is not made. Besides, the courts will not amend writs of summons.

Watson and *J. Henderson* appeared in support of the rule.

PARKE B.—A great majority of the judges were of opinion, that no amendment of a writ of summons should in any case be permitted (a). That rule was however deviated from in the single instance of *Horton v. Inhabitants of Stamford* (b), where this court allowed such an amendment, on the ground that if the general rule was adhered to, the plaintiff's remedy would be barred by the operation of the statute of limitations.

(a) And see *Barker v. Weeden*, post.

(b) *Ante*, Vol. III. 868.

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As that case is precisely in point, this writ may be amended as falling within the only exception to the rule on the subject.

BOLLAND B.—In the case cited, Mr. Baron Bayley in giving judgment, puts cases where even in penal actions amendments have been permitted on the ground that the party would otherwise be too late to commence a fresh action.

ALDERSON B.—The case cited being a distinct authority, the rule should be made absolute.

GURNEY B. concurred.

Rule absolute (a).

(a). See *Hodgkinson v. Hodgkinson*, K. B. May 27, 1834, 1 Adol. & Ell. MSS. and *Barker v. Weedon*, post, 860.

PATMORE against COLBURN.

A previous agreement will be determined by a later one which is necessarily inconsistent with it in effect, though not

ASSUMPSIT on two agreements, the first, dated 28th May 1831, was as follows:

“Memorandum of an agreement made this day, between P. G. Patmore on the one part, and H. Colburn on the other part.

containing any express stipulation in terms for so superseding it. On 28th May 1831, plaintiff agreed with defendant for twelve months for the performance of various literary works to be thereafter indicated by the defendant; the plaintiff to receive from the defendant for the same six guineas a week, and not to be at liberty during the above twelve months to engage in any publication similar to that of “The Court Journal” mentioned in the agreement. By agreement between the same parties, dated 14th October 1831, the plaintiff agreed to take on himself the various duties of editing the publication called “The Court Journal,” recited to be then the entire property of the defendant, and to devote all his time and attention to the same, except the hours he had already engaged to devote on Saturdays and Mondays to superintending a paper named. The defendant was to pay the plaintiff 10l. a week: Held, that the first agreement was superseded by the second, so that the plaintiff could not recover on the latter after the second came into operation.

"The said Mr. *Patmore* agrees to enter into an agreement for twelve months, with the said Mr. *Colburn*, for the performance of various literary works to be hereafter indicated by the said Mr. *Colburn*.

"The said Mr. *Patmore* to receive from the said Mr. *Colburn* for the said literary labours, the sum of six guineas per week.

"Should any difference of opinion arise as to Mr. *Patmore's* performing his present engagement to the full extent, the matter to be referred to two indifferent literary persons, one to be named by each party, whose award is to be final.

"If is further agreed between the said parties, that Mr. *Patmore* having been connected with the *Court Journal*, shall not, during the above period of twelve months, engage in any other similar publication; but that at the end of six months from the present date, he shall be at liberty to purchase such share of the journal as may hereafter be agreed upon, at the present estimated value of 5000*l.* for the whole property; such share not to be less than one fifth of the whole.

"It is also finally agreed, that Mr. *Patmore* shall abandon all hostile proceedings against Mr. *Colburn*, and that Mr. *Colburn*, on his part, shall abandon all pecuniary claims on Mr. *Patmore* up to the present period."

(Signed by plaintiff and defendant.)

The second agreement, dated 14th October 1831, was in these words:

"This agreement is made this day between *H. Colburn* of *New Burlington Street*, publisher, of the one part, and *P. G. Patmore*, of *Craven Hill*, gent., of the other part.

"The said *P. G. Patmore* hereby agrees, on or before the 12th day of *November* next, to take upon

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himself the various duties of editing the publication called the *Court Journal*, now the entire property of the said *H. Colburn*, to devote all his time and attention to the same, save and except the hours he has already engaged to devote to the *County Press*; and which hours are not to be increased beyond those at present required on the *Saturday and Monday* in each week, so that they shall not interfere with the time and attention necessary to be given to the *Court Journal*; and the said *P. G. Patmore* hereby undertakes the literary management of the *Court Journal*, and to prepare for the press all articles belonging thereto, to the best of his ability and to the satisfaction of the said *H. Colburn*; to write on the average an original article weekly; also the reviews and articles of fashion, music, literature, the drama, fine arts, digest of political events, to select from other journals all that may be found suitable for the pages of the *Court Journal*, and generally to contribute, to the utmost of his power, to the interest and success of the said journal.

“ That the said *H. Colburn* shall pay to the said *P. G. Patmore* for such editing, management, and writings, at the rate of 10*l.* per week, in quarterly payments.

“ That anticipating the successful result and exertions of the said *P. G. Patmore* in favour of the said journal, this agreement is entered into between the parties, in full confidence of its becoming a permanent one, although it is for the present agreed upon, that it shall be legally binding for one year, and subject at that period or any more remote one, to be terminated by either party, on giving three months’ notice to the other.

“ That with a view to render still more permanent the interest of the said *P. G. Patmore* in the said journal, it is hereby agreed, that on or before the

expiration of the said year, or at any subsequent period, whilst he remains editor on account of the said *H. Colburn*, that the said *P. G. Patmore* shall have the option of purchasing a quarter share of the said journal at the present estimated price of 1000*l.*, whatever higher value it may be of at such future period.

"It is also hereby expressly agreed upon, that political controversy and party politics shall form no part of the said journal, without the consent of the said *H. Colburn*, and the most perfect impartiality be adopted in the literary and critical departments.

"It is also hereby agreed, that the free admission of the theatres and other public places of amusement, and all books, prints, and publications sent for the purpose of reviewing, shall be equally divided between the said parties, for their mutual use and convenience."

(Signed by the plaintiff and defendant.)

The breach of the first agreement was assigned to be the not paying the plaintiff six guineas a week during the twelve weeks. The breach of the second, was the non-payment of the 10*l.* a week, and the discharging the plaintiff from his employment under it without proper notice: Plea, non assumpsit. The particulars of demand were for sums claimed to be due on the two agreements, without any claim on a quantum meruit. At the trial before *Vaughan B.* at the *Middlesex* sittings after *Hilary* term, it appeared that if the first contract was superseded by the second, the defendant would owe nothing to the plaintiff. The plaintiff had been paid at the rate of six guineas a week from the date of the first down to that of the second agreement, and ten guineas a week after the latter date. The plaintiff had a verdict for the sums claimed on both agreements, subject to leave to move to enter a nonsuit on the above point.

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Follett having obtained a rule accordingly,

Lee and *Petersdorff* showed cause. The terms of the agreement of 28th May 1831, show that it was binding on the defendant for twelve months certain; nothing appears on the second agreement to show it superseded thereby, before that time elapsed. The defendant having engaged to employ the plaintiff for twelve months certain at six guineas a week, the plaintiff agreed that he would not "during the above-mentioned period of twelve months, engage in any other similar publication." That was the chief object of the defendant's contract; therefore if the plaintiff is not entitled to be paid by the defendant during the time that he engaged not to enter on any other similar undertaking, he will have been debarred of obtaining his livelihood during that time. It is not disputed that the work was done properly under the first agreement, or that the defendant has been ready and willing to discharge his part of the agreement for the twelve months; and if so, then, though not called on to do so, he may recover for the whole time, *Gandall v. Pontigny* (a). [*Alderson B.* By the second agreement, the terms of the contract were changed. Can you say that both agreements are in force at the same time?] The second agreement is not inconsistent with the first; for though by it the whole of the plaintiff's time is to be devoted to the duties of editing the *Court Journal*, with the exception of certain hours required for the *County Press*, and no time is excepted for performing the plaintiff's duties under the first agreement, that was unnecessary, it having been expressly stipulated for already by that instrument. [*Alderson B.* By the second agreement he is to devote *all* his time to the *Court Journal*, except the

(a) 4 Camp, 375; 1 Stark, C. N. P. 198. S. C. recognised in *Collins v. Price*, 5 Bing, 132. See *ante*, 612. n.

hours he bestows on the *County Press*. Then what time has he to give to perform the literary labour mentioned in the first agreement?] "All his time," means all that is necessary to conduct the *Court Journal* well, and does not prevent him from using extra exertion to do other work. [Lord *Lyndhurst*. The many degrees of merit in conducting a publication, *e.g.* well, better, or extremely well, might generate a perpetual contest whether the work was properly done or not. The best security that the defendant could take for its due execution, would be that of stipulating for the editor's whole time, so as to prevent his mind from being distracted by other publications, and to concentrate his taste and energies on the single object of the *Court Journal*.] The time occupied by literary labour must vary according to the way in which it is executed. Now this agreement stipulates for the whole time to be so employed by the plaintiff; nothing in the second agreement prevented his doing other work by extra exertion. What hours of the twenty-four are to be considered for this purpose, as "all a man's time?" [Lord *Lyndhurst* C. B. If I engage a tutor to devote his whole time to the educating my child, and he takes another, might I not complain of his doing so, and would it be any answer to say that my child was properly educated?] It was then contended, that the conduct of the defendant in calling on the plaintiff since the date of the second agreement to perform services not included in it, showed that it was never intended that the first agreement should be superseded. [Lord *Lyndhurst* C. B. The defendant might have waived the second agreement as to those particular matters; but there is no evidence to show that he called on the plaintiff to perform them, in reference to the first agreement, or that they were done while it continued to exist. Those services might have been the subject

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of a quantum meruit, had not the particulars of demand distinctly marshalled the items of the plaintiff's demand under the two agreements only.]

Follett and Cowling in support of the rule, were stopped by the court.

LORD LYNTHURST C. B.—If the second agreement of 14th *October* 1831 superseded the first of the 28th *May* in that year, it was proved that the plaintiff had been paid down to the first of those dates, according to the first agreement. If the first agreement was not so superseded, the plaintiff would be entitled to retain his verdict. The only question then is, whether the first agreement was in force after the date of the second? I am of opinion that it was not; and that it was constructively put an end to by the second agreement, the stipulations of which are so totally inconsistent with those of the former in many respects, that it could not itself be operative if the first still continued.

BOLLAND B.—A material difference between the two agreements appears in the improved terms under which the second leaves it open to the plaintiff to purchase a share in the *Court Journal*; nor did the first agreement stipulate for the whole of the plaintiff's time, or except any hours for his superintending the *County Press*. On the whole it appears, that the first contract was intended to be put an end to when the second began to be acted on.

ALDERSON B.—The second agreement was clearly inconsistent with the first. The effect of the first agreement was, that the plaintiff should give as much of his time as should be requisite to perform various

literary works to be indicated by the defendant. But by the second he agreed to devote to the various duties of editing the *Court Journal*, all his time and attention, except certain fixed hours reserved for labour at the *County Press*. Now that undertaking is evidently inconsistent with the existence of the first; for "all his time" must include that portion of it which was stipulated to be employed in literary labours, to be indicated under the first agreement. The second agreement binds the plaintiff to devote to the *Court Journal* all the time which he gives to literary work; and with one exception excludes all other kinds of literary labour.

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GURNEY B.—The different rates of valuation of a share in the *Court Journal* which are presented by the two agreements, are strong evidence that the second was intended to supersede the first.

Rule absolute to enter a nonsuit.

SIGGERS *against* LEWIS.

ASSUMPSIT against the defendant as indorser of a bill of exchange. Plea, that the action was commenced before a reasonable time had elapsed for the defendant to pay the bill, after notice to him of non-payment. Demurrer and joinder. The *Court* called on *Chandless* in support of the plea. The implied contract of the defendant is to pay in a reasonable time after notice to him of the non-payment by the acceptor. In assumpsit by the indorsee against the indorser of a bill of exchange, it is a bad plea to plead that the action was commenced before a reasonable time had elapsed for the defendant to pay the bill, after notice to him of the non-payment; for the cause of action accrued against the defendant immediately on his receiving the notice of dishonour.

Quere, if a tender promptly made within a reasonable time after such notice received, would be a defence to an action even for nominal damages only for non-payment in the interim?

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Walker v. Barnes (a) decided, that the drawer of a bill is only bound to pay it within a reasonable time after receiving notice of its dishonor; and that a tender by him on the day after that on which he received notice of the dishonor, was in time to prevent the holder from recovering damages for the non-payment in the interim between the notice of dishonor and such tender. For if it had been considered that any cause of action had accrued by the breach of any contract before the tender, the plaintiff in *Walker v. Barnes* must have recovered nominal damages, as in *Hume v. Peploe* (b), where the holder of a bill was held entitled to recover nominal damages against the acceptor, notwithstanding a tender had been made after the day of payment. The question here is, whether the plaintiff, when he commenced his action, had a good cause of action, or whether he had any good cause of action till a reasonable time elapsed after the defendant, the drawer, had notice of dishonor; where, as in this case, the law implies a contract by a defendant, it always allows a reasonable time for its performance. [Alderson B. You would argue that a declaration against a drawer or indorser, instead of merely alleging "that the acceptor did not pay the bill, though presented to him on the day when it became due, of all which the defendant then and there had notice," ought to go on and allege that "although a reasonable time has elapsed after the notice to the defendant of the non-payment of the bill, yet he hath not paid the same; but there is no instance of such a declaration. The cause of action is the non-payment to the plaintiff on request, and not, as argued, the non-payment after a reasonable time had elapsed after notice of non-payment.]

Lord LYNDHURST C. B.—In *Walker v. Barnes*, the

(a) 5 Taunt. 240; 1 Marsh. 36.

(b) 8 East, 168.

defendant tendered as soon as possible after he received notice of the dishonor. There appears to have been a kind of compromise in that case, the chief justice having said no jury would give the plaintiff a farthing damages. Now the contract of the drawer is, that the drawee will accept and pay the bill. Till the drawer has notice of the drawee's default he is not liable to any action, but he is liable to an action immediately on receiving such notice, unless the money be then paid. If after the notice to the drawer, and before a writ actually issued against him, he promptly and directly makes a tender, that, according to *Walker v. Barnes*, may be a defence (a). It is not unfrequent that a plaintiff, by suing out writs immediately a cause of action arises on a bill, estops the parties to it from all remedy, except by coming to a judge to stay proceedings.

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BOLLAND B. concurred.

ALDERSON B.—If a drawer should make a tender, or pay within a reasonable time after the defendant has received notice of the dishonor, and before action commenced against him by issuing a writ (b), that tender or payment might *perhaps* be pleaded, as having been done within that reasonable time. That would be acting on the principle of *Walker v. Barnes*. Assuming it to be a sound decision, it only establishes that tender in a reasonable time (24 hours) after receiving notice is a payment on the notice. The plea does not state that the action had not accrued, but that it was commenced before a reasonable time had elapsed.

GURNEY B. concurred.

Mansel was to have supported the demurrer.

(a) And see *Hume v. Peplos*, 8 East, 170. contra, per Lord Ellenborough. *Rivers v. Griffiths*, 5 B. & Ald. 620. *semb. acc.*; and see 1 Saund. 33. b. n.

(b) See *Alston v. Undershill*, ante, Vol. III. 427; *Thompson v. Dicus*, id. 823.

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WARREN *against* WARREN.

A letter written by the defendant and containing a libel, was dated in *Essex*, and addressed to a person in *Scotland*. It was proved to have been in the *Colchester* post office, and, after being marked there, to have been forwarded to *London* on its way to *Scotland*. It was produced at the trial, with proper post-marks, and with the seal broken, but not by the party to whom it was addressed. Held sufficient *prima facie* evidence of a publication in *Essex*, and that it had reached its address in *Scotland*.

A letter to the manager of a property in *Scotland* in which plaintiff and defendant

were jointly interested, relating principally to the property, and the plaintiff's conduct respecting it, but also contained a passage reflecting on his conduct to his mother and aunt:—Held, that the latter part could not be privileged as a confidential communication,

CASE for a libel contained in a letter. Plea: general issue. At the trial before *Gaselee J.* at the last assizes for *Essex*, the letter in question was produced with the seal broken, and the *Colchester* postmark on it. It bore date at *H. house in Essex*, and was proved to be in the defendant's writing, addressed to a person in *Ayrshire*, who was the manager of property in which the plaintiff and defendant (brothers) were interested, and about which there had been litigation. It principally concerned that property, but in one passage charged the plaintiff with tyrannizing over his mother and aunt, the writer stating that he thought it necessary to explain why he was opposed to the defendant. The *Colchester* postmaster proved the receipt of the letter at *Colchester* from *Hawksley*, the *Colchester* postman, and his own writing the amount of postage on it, and that it was forwarded to *London*, on its road to *Scotland*. The person to whom the letter was directed was not called to prove its receipt. The defendant's counsel objected, first, that a publication in *Essex* was not sufficiently proved; and secondly, that it was a privileged communication. The learned judge held that the putting a letter into the post in *Essex*, and its receipt by the party, was evidence of a publication in *Essex*. The plaintiff had a verdict for one shilling damages, subject to leave to move to enter a nonsuit, first, on the ground that there was no proof of publication in *Essex*; and secondly, that if there was, it was a privileged communication.

A rule having been obtained by *Platt* according to the leave reserved,

Spankie Serjt. showed cause. First, there was evidence for the jury of publication. [*Parke* B. The production of a letter with the seal broken, and the postmark on it, is strong *prima facie* evidence that it had been received by the person to whom it was directed.] Secondly, the charge against the plaintiff, of tyranny over his mother and aunt, was not a privileged communication.

Platt and *Channell* contra. There was no evidence that the letter was received in *Scotland* by the party to whom it was addressed, or how it reached the plaintiff's hands. But if there was *prima facie* evidence, the judge should not have treated the receipt of the letter as conclusively proved, but should have left it to the jury to say whether the party received it or not. Secondly, the judge never left it to the jury to say whether it was a privileged communication or not. Now its terms show it to have been written in answer to one addressed to the writer, respecting the property in which the plaintiff and defendant were jointly interested; *Macdougall v. Claridge* (a). That was clearly confidential and a privileged communication, unless the plaintiff could have proved express malice.

PARKE B.—*Prima facie* evidence is sufficient for a jury till the contrary be proved. Now the sending a letter by the post is *prima facie* evidence that it was forwarded according to its direction, and that the person to whom it was addressed received it in due course of post (b). The only question is, whether that part of

(a) 1 Camp. 267, and see *Toogood v. Spring*, ante, 882.

(b) See *Rex v. Wilkinst*, 2 Campb. 566; *Rex v. Watson*, 1 Camp. 215; *Rex v. Burdett*, 4 B. & Ald. 95; *Rex v. Johnson*, 7 East, 66; *Abby v. Lill*, 2 Blig. 599; *Rex v. Plumer*, Russ. & Ry. C. C. L. 164; and *Fletcher v. Braddyll*, cor. *Holroyd J. Lane*, 1822. 2 Stark. Ev. 466. n.

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the letter not respecting the property in which the parties were jointly interested could be considered privileged. Now though it might be privileged as confidential so far as it respected their common property, it must be held to be gratuitous as far as related to the plaintiff's alleged conduct to his mother and aunt. The manager of the *Ayrshire* estate could have no concern in that. As to the judge's certifying to deprive the plaintiff of costs, we have no power to control his discretion on that subject.

The other barons concurred.

Rule discharged.

DOE dem. LEWIS *against* Earl CAWDOR.

Land belonging to the father of the lessor of the

EJECTMENT for a piece of land on which a smelting-house and furnace had been erected near plaintiff had been held by his leave, and under him, by the father of the defendant, from 1812 to his death in 1821, on an understanding that a lease was to be granted. After that event the land remained in possession of the defendant till the death of the father of the lessor of the plaintiff in 1829, and from that time till the ejectment delivered. No claim or payment of rent or acknowledgment of tenancy by either the defendant or his father was shown. No demand of the possession from the defendant was shown; but in order to show that the defendant had determined the tenancy by disclaimer, the lessor of the plaintiff put in a letter from the defendant and two more from his agents. In the first, the defendant stated, that the facts not being within his knowledge, he had referred them to his solicitors, and had requested them to communicate with the lessor of the plaintiff. The second letter to him from the solicitors ran thus:—The defendant has given us a letter from you on the subject of some ground you state to have been let by your father in 1811, and which has ever since been in the possession of his lordship's family. We will thank you to let us have the proofs that it was not the late lord's own. The other letter from one of the solicitors requested further information as to the late Mr. Lewis having a right to let the ground to Earl C. Held, that those letters did not amount to a disclaimer, and that if they did, they would not be sufficient for that purpose, being written after the day of the demise laid in the declaration.

The letter of the defendant did not authorize his solicitor to bind him by any disclaimer.

Semble, If an admission of a disclaimer is made after the day of the demise, it must recognize a disclaimer as having been made antecedent to that day, or it will not determine a tenancy.

Llanelly in *Glamorganshire*. The day of the demise was laid 2d of *March* 1830. The venue had been changed to the county of *Carmarthen*, and at the last summer assizes for that county, it was opened by the counsel for the lessor of the plaintiff, that in 1813 his father, then solicitor and confidential agent to the defendant's father, the late *Earl Cawdor*, suffered the latter to erect works for smelting lead, at the expense of 800*l.*, on a little piece of waste land called the *Hook*, being a "pill" of land reached by high tide, which adjoined to, and, as they stated, was part of *Penrhos* farm, the agent's property, on the understanding that a lease was to be granted to the earl on terms to be afterwards settled. The late earl died in 1821, and no such lease was ever granted to him; but the smelting works were abandoned in a few years after they were built, and were afterwards let by the late *Mr. Lewis*, as *Lord Cawdor's* agent, to *Messrs. Waddle*, who had paid rent to *Lord Cawdor*. *Mr. Lewis*, the agent, died in 1829. No rent paid to him, claim of rent by him, or acknowledgment of his right by either earl appeared, but it was set up that the rent of a field of *Lord Cawdor's*, occupied by his agent, had been set off against the rent due from *Lord Cawdor* for the *Hook*. In 1830, his son and heir, the lessor of the plaintiff, applied to *Lord Cawdor* requesting a settlement of the terms on which the land in question was to be held of him by *Lord Cawdor*. The following letters were then produced for the lessor to show a disclaimer by the defendant.

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" *Grosvenor Square*, 3d *March* 1830.

" Sir,—I beg to acknowledge the receipt of your letter on the subject of the lead works at *Llanelly*. As the circumstances mentioned in it are not within my knowledge, I have placed it in the hands of *Messrs. Farrer*,

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and have requested them to take an early opportunity of communicating with you.

David Lewis esq.

(Signed)

Cawdor."

"Sir,—Earl *Cawdor* has given us a letter from you on the subject of some ground you state to have been let by the late Mr. *Lewis* in 1811, and which has ever since been in possession of his lordship's family; we will thank you to let us have the proofs that it was not the late lord's own, as you are aware that the subject is one that the present earl is totally unacquainted with except from your letter.

D. Lewis esq.

(Signed)

Farver's & Co.

Lincoln's Inn Fields, March 4, 1830."

"Sir,—I should be very glad if you would furnish further information than that contained in your letter of the 6th of *March*, as to the late Mr. *Lewis* having a right to let the piece of ground in question to Earl *Cawdor*, as it appears to me that the single fact mentioned in your letter, at the utmost, only shows that Mr. *Lewis* might claim it, and does not at all aver that Lord *Cawdor* admitted it even on the representation of his own agent. However, I hope to see Mr. *Williams* either at the *Hereford* assizes or in town soon, and will then enter upon the subject with him.

D. Lewis esq.

Your's, &c. *Thomas Farver.*

March 10th, 1830."

For the defendant evidence was then adduced to show that the "pill" in question was waste of the defendant's manor. The judge told the jury the question was, whether or not the works had been built on Mr. *Lewis's* land by his permission, and they found they had, and gave a verdict for the lessor of the plaintiff.

In *Michaelmas* term last the *Solicitor-General* (Sir *John Campbell*) obtained a rule for a nonsuit, and it was contended that at all events notice to quit was necessary. *Bosanquet J.* held that the letters produced amounted to a disclaimer, which rendered that proof unnecessary, but gave leave to move to enter a nonsuit.

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John Evans and *E. V. Williams* showed cause for the plaintiff in *Easter* term. The question is, whether the lessor of the plaintiff could recover without proving a notice to quit to or demand of possession from the defendant, or without some wrongful act, as disclaimer &c., by him, to determine his lawful possession before the day of the demise laid in the declaration (a). [*Parke B.* The lessor of the plaintiff must show a right to enter on 2d *March* 1830, the day on which the demise is laid.] The late earl was, during his life, tenant at will in its strictest sense to the late *Mr. Lewis*, having entered with his consent under an agreement for a lease (b). That tenancy at will determined by the lessee's, the late earl's death (c); and the subsequent possession of the present lord does not amount even to a tenancy at sufferance, for it did not originate in a lawful title (d); then no notice to quit was necessary (e). In *Doe v. Pasquali* (f) a notice to quit was held necessary before an ejectment could be maintained against

(a) See *Right v. Beard*, 13 East, 210, §12; *Doe v. Jackson*, 1 B. & Cr. 448; *Doe v. Stennett*, 3 Esp. 716; *Doe v. Smith*, 6 East, 530; *Doe v. Lawder*, 1 Stark. C. N. P. 308; *Doe v. Quigley*, 2 Campb. 505; *Doe v. Sayer*, 3 id. 8; *Hagan v. Johnson*, 2 Taunt. 148; *Doe v. Breach*, 6 Esp. 106.

(b) See note to 7th edition of *Watkins on Conveyancing*, 19.

(c) Co. Lit. 62, b. 57; *Oland's case*, 5 Rep. 116, cited 2 Bla. C. 146, and *Watkins's Principles*, 7th edit. 2.

(d) See same work 23, and Co. Lit. 57 b.

(e) See *Doe v. Lawder*, 1 Stark. C. N. P. 308.

(f) 1 *Peake's Cas.* 197, 1st edit.; 259, 3d edit.

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a tenant in possession, who having held of the testator under whom the lessors of the plaintiff claimed as devisees, professed himself ready to pay his rent to any person who was entitled to receive it, though he had not paid it to the lessors of the plaintiff, the due execution of the will having been litigated. In that case, a clear tenancy to some one was admitted to exist; whereas here, the defendant claimed the *locus in quo* as his own. *Doe v. Pasquali* will not be extended further, as appears from *Doe v. Frowd* (a). There, though the tenant in possession set up no claim to the premises, but, in answer to a request to him for rent by the reversioner after the death of the former lessor, a tenant for life, declared that he had not hitherto considered the lessor of the plaintiff to be the landlord of the premises, but professed himself ready to pay the rent to any one who should be proved to be entitled to it, the court held that a disclaimer, *Best* C. J. adding, that he should not have thought differently had the case been exactly like that of *Doe v. Pasquali*, because a notice to quit is only requisite where a tenancy is admitted on both sides; and if a defendant denies the tenancy, there can be no necessity for a notice to end that which he says has no existence. [*Parke* B. To what period does the alleged disclaimer refer?] To any period since 1812, on which the demise might have been laid. Thus in *Wilton v. Girdlestone* (b), a demand and refusal after a bill had been actually filed in trover, was held evidence of a conversion before that time. In *Doe v. Grubb* (c) the declaration by the tenant in possession on 26th June 1813, that his connection with J. G. had ceased for several years, was held to be evidence of a disclaimer antecedent to the day of the demise laid in the declaration, viz. 1st May 1813. Now the letter of

(a) 4 Bing. 557.

(b) 5 B. & Ald. 847.

(c) 10 B. & Cr. 816.

4th *March* falls within that principle, as a statement by the defendant that he held the land as his own.

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The *Attorney-General* (Sir John Campbell), John Wilson, Chilton, and Whitcombe supported the rule for the defendant. This land was held by the late lord with the knowledge of his late agent and the lessor of the plaintiff, without their disputing his title from 1812 to the service of this ejectment. Then the possession of the late earl and of the defendant was lawful, and could only have been determined by demand of possession, which is not proved, or some act of disclaimer by him previous to 1st *March*, the day of the demise laid in this declaration. Now the letter dated 4th *March* makes no assertion or disclaimer, but only calls for information and proof that the land was not the late earl's own property. It would not have been a forfeiture of a lease had one been granted. The third letter adjourns the question to a meeting at *Hereford* assizes, which is not shown to have taken place. [*Parke B.* Had Mr. *Farrer*, as agent to the defendant, authority under his first letter to admit antecedent facts as against his client? To make this a disclaimer it must be connected with the previous facts.] *Doe v. Pasquali* ascertains the law correctly (a). In *Doe v. Frowd* the defendant's letter stated that he had never considered the lessor of the plaintiff as his landlord, and amounted to a distinct refusal to pay rent.

Cur. ado. vult.

Early in this term the judgment of the court was delivered by

(a) *Gaseles J.* remarked in *Doe v. Frowd*, 4 Bing. 560, "If the defendant had held under the ancestor of the lessor of the plaintiff, the question agitated in *Doe v. Pasquali* might have arisen; but all his interest expired on the death of Mrs. *Smallpiece*", (the tenant for life, the defendant's lessor.)

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PARKE B.—This was an action of ejectment for the recovery of some land which had been enjoyed by the late Earl *Cawdor*, and after his death by his son the defendant, under Mr. *Lewis*, the father of the lessor of the plaintiff. The chief question was, whether certain letters given in evidence at the trial of this cause amounted to a disclaimer of the title of the lessor of the plaintiff. The evidence produced at the trial showed that the late earl came into possession as tenant at will to the late Mr. *Lewis*. It was contended for the defendant, that under the circumstances it was necessary for the lessor of the plaintiff to show a determination of the tenancy of the present defendant by a notice to quit or a demand of possession (a); while, for the lessor of the plaintiff, it was replied, that the letters in question amounted to a disclaimer, and put an end to any tenancy which had subsisted between the parties. To this last argument the learned judge assented, but we do not concur with him in opinion. We think that those letters did not amount to a disclaimer, and that if they did, such disclaimer would not be sufficient, for it was written after the day of the demise laid in the declaration, so that without other proof the defendant does not appear to have been at that time a trespasser. If they are insisted on as containing an admission of a previous disclaimer, it is clear they should amount to a recognition of a disclaimer antecedent to the day laid as that of the demise. If, therefore, we could place any reliance on those letters, there is still no evidence in the cause to show that the writer had authority to

(a) The possession of the defendant seems to have been taken at the trial as referable to a tenancy at will, and therefore entitling him to a notice to quit or a demand of possession. Had it been at sufferance only, entry on the premises by the lessor of the plaintiff would be sufficient without demand of possession; *Doe v. Lawder*, 1 Stark. C. N. P. 398.

bind the defendant by any disclaimer he might make on his part.

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A determination of the defendant's tenancy must therefore be made out in some other way, or the action would not be maintainable. It has been argued, that the facts of the case showed that the late earl was a tenant at will only, whose tenancy therefore terminated with his death in 1831; and that the tenancy of the present defendant, if amounting to a tenancy at will, or even at sufferance, was determined by the death of Mr. Lewis, the father of the lessor of the plaintiff, in 1830. That point was not made at the trial; if it had, the defendant might have been able to prove circumstances amounting to a new tenancy at will, which would have made a demand of possession necessary before bringing an ejectment. It may turn out that the defendant's tenancy was finally determined by Mr. Lewis's death, therefore we cannot grant a rule for a nonsuit, but for a new trial only.

Rule absolute for a new trial.

FARMER *against* CHAMPNEYS, Bart.

SPECIAL demurrer to a declaration, alleging for cause that a venue had been inserted in the body, contrary to *Reg. Gen. Hil. 4 W. 4. No. 8 (a)*.

The inserting venue in the body of a declaration contrary to *Reg. Gen. Hil. 4*

*Chandless* in support of the demurrer. The general rule cited being made in pursuance of stat. 3 & 4 W. 4. c. 42. s. 1. has the same binding effect as an express enactment prohibiting any venue to be inserted in a declaration. The rule, in fact, is an act of the legislature, providing that the forms of declarations shall

*W. 4. No. 8* is the subject not of demurrer, but of an application to a judge at chambers to strike it out.

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be without venue. Then the special demurrer points out this informality of pleading. As to the venue being surplusage, the rule has not declared it unnecessary, but has prohibited its insertion. Nor is the objection merely technical, for in many cases local description is requisite, and if the only way of enforcing the rule be by applying to a judge at chambers to strike out what one party contends is mere venue, a judge might strike out as such what is intended to be local description; and if the same party should afterwards demur for want of local description, he might obtain judgment on that ground against the very party who had correctly inserted it in his pleading as originally framed.

*Per Curiam.*—It could not have been the intention of the framers of these rules that this insertion should be the subject of demurrer. Applications are now frequently made to judges at chambers to strike out the venue when improperly inserted. That is the proper mode of taking advantage of the error, as the point is new. The defendant may amend; the costs to be costs in the cause.

*George* was allowed to make a similar amendment in *Neil v. Davies*, which stood for argument on a similar point.

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### BARKER *against* WEEDON.

When the affidavit of debt was for goods sold and delivered, but the writ was

A Rule had been obtained by *Heaton* for setting aside the *capias* for irregularity, and for discharging the defendant out of custody, on the ground "in an action on the case," though indorsed with the amount of the debt: Held that though the writ was not irregular on that account, the arrest was irregular, as there could not be a good declaration on the writ, and the defendant was discharged.

A writ of summons directed to the sheriffs of *Middlesex* is bad, and will be set aside with costs.

that while the affidavit to hold to bail was for goods sold and delivered, the writ on the face of it called on the defendant to answer the plaintiff in an action on the case, and being indorsed with the amount of the debt.

Cause was shown by *W. H. Watson* that the writ was not necessarily void, as a person may be held to bail in case on a judge's order. The indorsement is not part of the writ.

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PARKE B.—We are of opinion that the writ ought to stand, it being regular; for a party may be holden to bail in case, and the indorsement is no part of the writ; but as the plaintiff cannot have a good declaration on the writ, the arrest is irregular, and we ought not to keep the defendant in custody till the plaintiff shall chuse to declare. The rule should therefore be absolute without costs.

It was then pointed out that the writ was directed to the sheriffs of *Middlesex* as to two individuals, instead of the sheriff of *Middlesex* as one officer. It was answered for the plaintiff that the writ was substantially correct and could not mislead. But

*Per Curiam*.—This last irregularity is fatal, for great strictness is required in writs. The office of the two individuals is that of “sheriff” of *Middlesex*.

Rule absolute with costs.

See *Lakin v. Maitle*, ante, p. 837; *Nicol v. Boyu*, 10 Bing. 339; *Byfield v. Street*, id. 27; *Hodgkinson v. Hodgkinson*, K. B. Trin. 1834, 1 Adol. & Ell. MSS.; *Sutton v. Burgess*, Exchequer, 13th Jan. 1835.

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Personal demand on the party liable to pay costs under the master's allocatur is essential before an attachment can be moved for non-payment of costs.

## STONKELL against TOWER.

A Rule had been obtained calling on the defendant to show cause why an attachment should not issue for non-payment of costs, pursuant to the master's allocatur, on affidavits showing that the costs had not been personally demanded from the defendant, but that the party who went to serve him at his house served his daughter there, not being permitted to see the defendant, but hearing his voice in the house. After cause shown, *Green v. Prosser* (a) was cited in support of the rule.

Lord LYNTHURST C. B.—The hearing the defendant's voice in the house only shows that he was at home at the time it was attempted to serve him. The question remains, whether the service on the daughter was sufficient? And the rule universally laid down in cases of this nature so nearly affecting the liberty of the subject, shows that it was not. It was absolutely necessary to serve the defendant personally with a copy of the rule and of the master's allocatur, showing him at the same time the original rule, and demanding payment of the costs (b). The court is the more anxious to restate the acknowledged rule, as the case cited might be supposed to authorize a less strict practice. The rule ought never to have been granted.

*Per Curiam*.—Rule discharged.

*R. V. Richards* for, *Heaton* against the rule.

(a) 2 Dowl. Pract. Cas. 99.

(b) See Tidd, 9 ed. 990.

RICHARD *against* ISAAC.

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**JUDGMENT** as in case of nonsuit was moved for on an affidavit, entitled "*Thomas David Isaac at the suit of John Richard.*" *Chilton* contended that the cause was sufficiently designated, but

An affidavit, entitled, "The defendant at suit of the plaintiff," and produced by the defendant, cannot be read.

**GURNEY B.**—The affidavit must be entitled in the cause, and a deviation from the usual mode of entitling it, as by the plaintiff against the defendant, has never been allowed.

*Chilton* took nothing by his motion.

GOULD *against* LASBURY.

**DEBT.** Common counts for sheep sold and delivered by the plaintiff to the defendant, and on an account stated between them. Plea: that the defendant was discharged by an order of the insolvent debtors' court, according to the insolvent debtors' act, of and from the said several debts and causes of action, if any, and each and every of them. Special demurrer, assigning for cause that the defendant by his plea had not confessed and avoided the causes of action to which it was pleaded, and had attempted to avoid without confessing the causes of action to which the same is pleaded; and hath by the plea alleged that he was duly discharged from the said several debts, &c., "if any," &c., without confessing that there were any such debts; thereby attempting to put in issue several matters and rendering the plea double. Also that the plea neither set out the discharge specially, nor followed

A plea to an action of debt for goods sold and delivered, and on an account stated, that the defendant was discharged by order of the insolvent debtors' court, "of and from the said several debts and causes of action, if any," is bad on special demurrer, for hypothetically and not directly confessing the cause of action sought to be avoided.

*Seemle,*  
"supposed" only amounts to "alleged."

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the general form of pleading given by the statute(s). Joinder.

*Erle* for the plaintiff supported the demurrer. The plea is bad. First, it neither traverses the plaintiff's cause of action, nor does it confess it to have once existed, and afterwards distinctly avoids it by matter subsequent; viz., the defendant's insolvency. [*Parke B.* The rule of pleading is, that the defendant must at once confess the fact or cause of action in respect of which he relies on a discharge (b). *Taylor v. Cole* (c) is in point. So in *Griffiths v. Eyles* (d), an action for an escape, the court held that the defendant could not plead hypothetically, that if there had been any escape there had also been a return. Now here the plea admits the plaintiff's cause of action not distinctly, but hypothetically only.

Secondly, *Sheen v. Garrett* (e) shows that if an act of parliament prescribe a form of pleading, the party intending to avail himself of it in defence, must either pursue its language or plead in the more special manner required by the rules of law preceding the act. This defendant has done neither. The form pointed out by 7 G. 4. c. 57. s. 61. has no such words as "if any." [*Alderson B.* He is only discharged from those debts which he admits by his schedule. Is he discharged as to debts which he neither admits nor denies?]

*Kelly* in support of the plea. As to the first point, there is no doubt that the plea should traverse, or confess and avoid every material allegation. The question

(a) 7 G. 4. c. 57. s. 61.

(b) See per *Buller J.* 3 T. R. 298; and 1 Saund. 27, note (1.)

(c) 3 T. R. 292.

(d) 1 B. & P. 413.

(e) 6 Bing. 686. A plea of bankruptcy under 6 G. 4. c. 16. s. 126.

here is, whether the cause of action in the declaration is not substantially confessed by this plea in its present form? And if the words "if any" shall be held so to qualify the plea, as to prevent it from having that effect, the usual forms of pleas in bar of the statute of limitations, infancy, bankruptcy, discharge under the insolvent debtors' act, set-off, partnership in abatement, and in trespass, which have commonly stated the plaintiff's causes of action, or the defendant's trespasses, as "supposed," (a) or "if any," are also incorrect. The object of the rule of pleading is, that there shall be such a confession of the plaintiff's cause of action, as shall be sufficient for the purposes of that particular action; viz., to relieve the plaintiff from taking issue or proving it. It does not require that there should be such an absolute confession of it, at all events, as would be necessary were an issue to be raised on it as to the existence of the causes of action, or as would be available against the defendant in another action. [*Alderson* B. You would give to the words "if any" the effect of a protestation.] Yes. [Lord *Lyndhurst* C. B. Does "supposed" causes of action mean more than those "alleged" by the plaintiff to exist?] The terms "if any" and "if any such there be," are found in the forms of pleas of discharge under the insolvent debtors' acts, 1 G. 4. c. 119. s. 28. (b), and 7 G. 4. c. 57. (c), and under the bankrupt act 5 G. 2. c. 30. s. 7. (d), and 6 G. 4. c. 16. (e), which are usually approved by the profession. Again, in pleading nonjoinder in abatement, where the strictest construction has ever prevailed, the defendant alleges that the supposed promises in the de-

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(a) As to "supposed" see per *Wood* B. in *Jones v. Stevens*, 11 Pri. 276; *Hall v. Blandy*, 2 Y. & J. 486; 1 East, 213, 215; 3 Salk. 273.

(b) 3 Chitty on Pl. 4th edit. 920. edit. 1825.

(c) Id. edit. 1831.

(d) Id. 912. edit. 1825.

(e) Id. edit. 1831.

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claration "if any such were made," were made by him jointly, &c. (a) The plea of set-off often contains similar words. The effect of a protestation was to conclude the party making it, for the purposes of the pleading in that action only, the only issue taken being on the particular matter pleaded. Had the replication been general, and the defendant gone to trial on this plea only, could he have disproved or denied the causes of action as laid? or would the plaintiff have been bound to prove them? The terms "if any," "supposed," "alleged," &c., are commonly used to prevent the making any possible use of the admission out of the particular pleadings. *Gale v. Copern* (b) was assumpsit on an award. A plea of set-off stated that the plaintiff made his promissory note payable to A. C., which was duly indorsed and delivered to the defendant after A. C.'s death, by her administrator, and was unpaid. The replication was, that the "supposed" cause of set-off on the said note did not accrue to the defendant within six years in manner and form, &c. On this issue it was held at the trial, that though there was a subscribing witness who was not produced, the handwriting not only of the maker but of the indorser was sufficiently admitted on the pleadings, and that decision was upheld on argument in the King's Bench.

*Erle* in reply. The plea is bad, for containing not an unqualified, but at most only an hypothetical admission of the plaintiff's cause of action; now it is a rule in pleading, that the party justifying must show and admit the fact. (c) The judgment for the defendant

(a) 3 Chitty on Pl. edits. of 1825 and 1831, p. 900.

(b) Easter term 1834, not in print when the principal case was argued, now reported 1 Adol. & Ell. 102.

(c) Per Buller J. in *Taylor v. Cole*, 3 T. R. 298.

on a plea in abatement, being *quod cassetur bills*, or if for the plaintiff, being only *quod respondeat oster*, and not that the plaintiff do recover, viz. *secundum allegata et probata*, no inferences drawn from that form of pleading can affect pleas in discharge of the plaintiff's cause of action. The rule that a defendant is bound to traverse material matters alleged by the plaintiff, or to confess and avoid them, can only have place in pleading in bar; for on a plea in abatement, the defendant is only put to show that the plaintiff may have a better writ. It may be conceded that the word "supposed," is nothing more than "alleged;" but the doubt which its use occasioned in *Gale v. Capern*, shows that the use of words exceeding it in effect will not be sanctioned. The analogy of protestation does not hold good: for where of several matters alleged in pleading a party was bound if replying, or chose in a plea to traverse or confess and avoid one in particular (a) without assuming to answer the other matters, he might, by way of protestation, exclude them from consideration by confessing them in that action, though for no other purpose whatever—an effect which took place under the well known rule of law; whereas here the defendant, though assuming in his plea to avoid the plaintiff's cause of action, does not confess it explicitly as to any part, but qualifies his confession hypothetically. In *Gale v. Capern* the only question was, what was the issue to be tried? and it was held that the handwritings of the maker and indorser were not in issue, being admitted. That had nothing to do with the form of pleading. The plaintiff, before going to trial, was entitled to know what the defendant would traverse and what he would confess, so as to be prepared with evidence accordingly. The difficulty which

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(a) See now *Reg. Gen. H. 4 W. 4. No. 12. p. xii. this Vol.*

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arose at the trial of *Gale v. Capern*, whether the subscribing witness ought to have been called, would have been prevented had the plaintiff specially demurred to the plea for defect in form, as is here done. In the last plea in *Taylor v. Cole*, the fact of expulsion justified by the defendant *Cole*, had been done by *Harris* a third person, and was not therefore within the peculiar knowledge of the defendant; yet the plea was held bad, because it did not confess an expulsion by the defendant himself. [*Alderson B.* In *Griffiths v. Eyles* the warden of the *Fleet* omitted to confess in his plea, a fact which must be taken to be peculiarly within his own knowledge, that of the prisoner's escape. The court there held the defendant bound to know the state of his prison, compelling him to a distinct confession of the escape sought to be avoided; and held a rejoinder bad for only confessing it hypothetically, "if any such escape so newly assigned was made." In *Griffiths v. Eyles* the number of escapes was most material; the defendant's knowledge of them was only a presumption of law; whereas here the defendant must have known whether he was indebted or not.

Lord LYNTHURST C. B.—It is difficult to distinguish the expression "supposed" from that of "if any." However, as there has been a decision in the King's Bench, in which a construction is said to have been put on the word "supposed," we will inquire into the particulars of that case, and consider whether or not the term "supposed" is convertible and synonymous with "if any."

*Cur. adv. vult.*

On a subsequent day, the judgment of the court was delivered by

Lord LYNTHURST C. B.—The plea of discharge under the insolvent debtors' act was contended to be bad, because it did not directly confess and avoid the matters alleged in the declaration, but merely stated, by way of avoidance of them, that the defendant was discharged from the said causes of action "if any." This court was of opinion, at the time of the argument, that the plea was invalid. A similar point having been argued in the King's Bench, we have conferred with the judges of that court on the subject, and they concur with us in thinking that the words "if any" vitiate the plea. The demurrer therefore is well founded.

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Judgment for the plaintiff.

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LORYMER *against* STEPHENS.

**A**SSUMPSIT by the owner of a ship against his late captain, for money paid, lent, had and received, and on an account stated. Plea: the general issue, with notice of set-off for wages. At the trial at the last *Somersetshire* assizes, the following facts appeared. The plaintiff, who had been engaged by the defendant to command his brig *Champion*, returned to *Bristol*, after a year's service in that capacity. Upon that occasion the plaintiff's brother produced to the defendant a debtor and creditor account, the balance of which, after debiting the defendant with 730*l.* for sums received by him for the plaintiff, and crediting him for various disbursements, was in favour of the plaintiff

The agent for the owner of a ship produced to the captain an account, which after debiting him with various sums received to the use of the owner, and crediting him for various payments on account of the ship, showed a balance against him. To that ac-

count the captain assented and signed it. The agent then produced another account of the captain's claim on the owner for wages; to which, as there stated, the captain refused assent. The first account was the only evidence of money had and received by him to the owner's use. In an action against him by the owner, both accounts were produced. Held, that the admission by the defendant on the first account of sums received to the plaintiff's use, conclusively proved the plaintiff to be entitled to recover on the count for money had and received; though *semble* under the circumstances, it was not evidence on the account stated.

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for \$701. This account, which did not include the defendant's claim on the plaintiff for wages, was signed by the defendant. The plaintiff's brother next produced another account, stating the defendant's claim to wages, saying that account must be settled. It showed a balance of 621. against the defendant. He would not assent to it, and said he must look into it, and would return it next day, but did not do so. *Williams B.* was of opinion, that these accounts (which were produced in evidence) afforded no proof of an account settled between the parties, and nonsuited the plaintiff. *Eric* moved in *Exeter* term for a new trial, and after stating the above facts, urged that though the plaintiff's case was opened on the account stated, he had a right to fall back on the count for money had and received. [*Lord Lyndhurst C. B.* The effect of the evidence seems to be, that the defendant admitted a balance of 3081. to be due from him on the money account, while nothing was definitively stated by him as to the balance of the wages account. Then his admission of the first account threw on him the onus of discharging himself from the balance claimed against him, provided the plaintiff could use the count for money had and received. Now though the plaintiff's case was opened as one of an account stated, yet when his evidence showed that the account so relied on was not complete, he might then rest his claim on the count for money had and received.] A rule having been granted for a new trial, subject to the production of the accounts,

*Follett* showed cause. The whole of the accounts between the parties was not contained in the first paper produced to the defendant, the balance on which appeared against him, and to which he assented, by signing it. The second paper contained the residue; by refusing his assent to that, he revoked his

recognition of the state of accounts in the former paper, as it must have been affected by the statements to which he objected in the latter. Then it was all one transaction; as much so as if the accounts had been stated on two opposite pages of a ledger, to one of which the defendant assented, while he disputed the other. [*Parke B.* Supposing the plaintiff cannot avail himself of the account stated, the count for money had and received would be supported by the defendant's admission of the sums received by him to the plaintiff's use, which are much larger than the balance claimed.] Still as the ultimate state of the account between the parties depends on both the statements into which it was divided, it is but one transaction; and the question remains, whether the defendant, having disputed the correctness of the second part of it, can be taken to have admitted a claim against himself on the first, considered singly.

*Erle contra* was stopped by the court.

**PARKE B.**—The defendant by signing the first account, distinctly admitted that the 700*l.* had been received by him to the plaintiff's use. As that admission stands perfectly independent of the account stated, the plaintiff may recover on the count for money had and received.

**BOLLAND B.** concurred.

**ALDERSON B.**—A particular account of charge and discharge is struck between the parties, and signed by the defendant. Surely it is sufficient to entitle the plaintiff to recover, that that account contains various items of money received by the defendant to the plaintiff's use.

**GURNEY B.** concurred.

Rule absolute.

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LEWIS *against* THOMAS ROGERS, Executor of ELIZABETH ROGERS, deceased.

A trader and small farmer being embarrassed in her affairs and pressed by a creditor, assigned "all her effects, stock, books, and book-debts," for the benefit of her creditors, and at the same time dictated a list of persons whom she stated to be creditors of her estate.

The assignee having dealt with the property after her death, was sued by one of her creditors as executor de son tort: Held, that the list was evidence as part of the transaction of the assignment in order to establish the bona fides of it, and so justify the defendant's intermeddling.

Held also, that cattle on the farm passed by the word "effects."

**A**SSUMPSIT on a promissory note made by *Elizabeth Rogers* for 10*l.*, dated 4th *December* 1830, and on the common counts, and account stated. Pleas: first, non-assumpsit; secondly, ne unques executor; and thirdly, plene administravit. At the trial before *Gurney B.* at the last assizes for the county of *Carmarthen*, it appeared that the promissory note was given for money lent by the plaintiff to the deceased, *Elizabeth Rogers*, who, in *February* 1831, kept a shop and small farm at *Pembrey*; and evidence was given of assets to the amount of 200*l.* in the defendant's hands. For the defendant, it was proved that being embarrassed and pressed for debt due to some *Bristol* creditors by letter from their attorney, dated about 17th *February* 1831, which was produced, but on objection, withdrawn, she took the advice of the clergyman of the parish, who, having from her books ascertained the state of her accounts, prepared the following assignment of her effects to *Thomas Rogers* for the benefit of her creditors, which she signed.

"Having received a letter from Mr. *G. T.* on behalf of *M. & Co. of Bristol*, threatening to commence legal proceedings for the recovery of 35*l.* 3*s.* 10*d.* which I could not liquidate by the time specified, in consequence of ill-health; under these circumstances, with a view to do justice to my creditors, I have been induced to suspend business, and I do hereby suspend business accordingly; and as you are my chief creditor to the amount of 50*l.* 16*s.* 7½*d.*, I do by this writing surrender, deliver up, and assign the whole and every of

my 'effects, stock, books, and book-debts' to you as trustee for and on behalf of my other creditors.

Your's truly, *E. Rogers.*

*Pembrey, 17th Feb. 1831.*

To Mr. *Thomas Rogers*, grocer &c.

Village, *Pembrey.*"

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The shop was immediately shut. On the next day a notice of distress for rent was served on her, under which her mare and four cows were sold on the 23d. This notice was produced in evidence by the clergyman. Notice of sale had been given about the end of *February*, but the actual sale was postponed on account of the precarious state of health of Mrs. *Rogers*. She died in the house on 2d *April*, in possession of shop goods and furniture, worth about 200*l.* which on her death were taken possession of by the defendant. At the trial, the defendant offered in evidence a list of creditors made out by the clergyman at the dictation of the deceased at the time of executing the assignment, in order to inform each of the assignment made, and also some of the letters which had been actually written. The plaintiff's name was not in the list. The defendant had acted in getting in the testatrix's debts and in disposing of the stock, giving receipts, purporting to be "for the creditors." For the plaintiff, it was objected, first, that to prove the distress, the bailiff ought to have been called to prove the notice, and that if it was not properly proved, the property in the cattle remained in her till her death, and was not included in the general words of the assignment; and the defendant was liable as executor de son tort, for having intermeddled with the goods. Secondly, that without the letter of 17th *February*, there was no evidence that the deceased owed any thing, and that to make the assignment valid, it should be shown that other creditors pressed for their debts. Thirdly, the

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list of creditors, as well as the letters prepared by the clergyman, were not evidence; the first being merely hearsay taken from the mouth of the deceased to colour the transaction. The learned baron told the jury, that if the defendant had taken possession of the goods without title under the assignment, he was an executor de son tort; and as to the fairness or fraud of the assignment, he left the case to the jury on the evidence of the clergyman, saying, that if they believed it they would give a verdict for the defendant. As to the animals sold under the distress, he held that if it was a regular distress, the title to them was in the vendee; if irregular, in the defendant under the assignment; but in neither case in the defendant as executor, so that that point was immaterial. The jury having found a verdict for the defendant on the first and second issues, were discharged from finding any on the last (a).

A rule for a new trial having been obtained with difficulty in *Easter term*,

Chilton, Whitcombe and James now showed cause. *Edwards v. Harben* (b) has been misapprehended. [*Atkinson B.* The goods there were suffered to remain in the hands of the debtor by agreement dehors the bill of sale.] Here the shop was closed and notice of sale given, so that the fact of the assignment could not fail to be notorious in a small village like *Pembrey*. The existence of creditors, as also the assignment to them, was sworn to by the clergyman, and the jury believed him. Here the court stopped them.

(a) For the verdict for the defendant on the plea of non-assumpsit would entitle him to the costs and costs, even if the issue on *plene administravit* had been found for the plaintiff; *Garnett v. Heslop*, E. 22 G. 3. Tidd, 908, n. (f). 9th edit.; see also 4 B. & Ald. 254; 8 Tamm. 719.

(b) 2 T. R. 587; approved by *Lawrence J. Steel v. Brown*, 1 Tamm. 353; see, however, per *Dallas C. J. Steward v. Lamb*, 1 Br. & Bing. 411. See Chitty jun. on Contracts, 325. 2d Edit.

J. Eams and Powell contra for the plaintiff. The list of creditors was improperly received in evidence; then it is impossible to say how far the jury were biassed by it in their verdict. That list was hearsay, being dictated by the deceased, so that her declarations are not evidence for the defendant, who claims under her, to prove that creditors existed, and the assignment was valid. The list does not contain the plaintiff's name, nor was it evidence to show that he knew the assignment. [Lord *Lyndhurst* C. B. The question of fraud has been disposed of by the jury.] Nor did the mare and cows pass under the general word "stock" in the assignment, which, as there collocated, means not cattle but stock in trade. "Effects" must mean articles ejusdem generis with those afterwards enumerated. Lord *Lyndhurst* C. B. That rule applies when the general words follow particular words.] Why prove the distress at all if the assignment was relied on? They also said that the letter of the attorney, having been suffered to be partly read, might have had effect on the jury.

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LORD LYNDBURST C. B.—All observation as to receiving in evidence the letter written to the testatrix by the creditor's attorney, is answered by the fact that the judge allowed the objection and stopped it from being read. The list of creditors was properly admitted in evidence as part of the transaction (a) by which the testatrix, who dictated it, at the same time assigned to the defendant her effects for the benefit of all her

(a) Declarations cotemporaneous with an act are admissible to prove the intent of that act, e. g. declarations of a bankrupt on denying or absconding himself in order to prove his intent to delay a creditor, avoid his creditors, &c., 2 Stark. on Ev. 94, 2d edit. So a conversation at the time of executing a deed is evidence as part of the transaction, *Murray v. Earl Stair*, 2 B. & Cr. 82; *Johnson v. Baker*, 4 B. & Ald. 440; *Jones v. Jones*, ante; Vol. III. 890.

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creditors, not to show that it contained the names of all her creditors, but that at the time of the assignment she represented the persons named in it to be her creditors. It was evidence then on the question whether the assignment was a *bonâ fide* or fraudulent transaction. I am also of opinion that the words of the assignment included the cattle; its object on the face of it indicated the intention of the testatrix to part with all her property for the benefit of her creditors; and it states that she suspends her business, part of which was the management of the farm, to which the cattle belonged.

BOLLAND B.—I am of the same opinion. No evidence of the letter was in fact admitted, except as far as it appeared from the assignment. The list of creditors was good evidence to show the *bona fides* of the testatrix; being prepared under her direction by the clergyman, whom she had called in as a friend, and who acted as her clerk on the occasion of her being pressed by the *Bristol* creditor. By his advice, she summons the principal creditor and persists in assigning all her property to her creditors, requesting him to act as trustee for them. All these facts were evidence on the question of fraud or not in the assignment. The word "effects" comprehends the cattle, and whether the evidence proved a lawful distress is not here the question, for if they passed under the assignment the defendant had sufficient title, and what was said at the trial falls to the ground.

ALDERSON B.—I agree. The plaintiff established a *primâ facie* case against the defendant as executor *de son tort*, by shewing his intermeddling with testatrix's goods. Then in order to justify that intervention and to show a title to the goods, the defendant proposes to show that the testatrix in her lifetime *bonâ fide* as-

signed them to him for the benefit of her creditors. In order to establish that defence he begins by offering in evidence a letter from an attorney pressing the testatrix for payment of a debt, to show her motive for assigning her property to her brother-in-law, the principal creditor. That letter was withdrawn as not being evidence, but being referred to in the assignment itself, which was next produced, came properly before the jury in that shape as a declaration by the testatrix that she had received such a letter, being made contemporaneously with her act of assignment. Next, a list was produced, taken down from her dictation by the clergyman who, at her request, prepared the assignment, and purporting to contain the names of some of the creditors in whose favour she purports to make it. The question being, whether the list was admissible in evidence, and if it was, for what purpose, I am of opinion that it was so admissible, as forming part of the transaction of assignment, in order, by showing the circumstances under which she executed it, to prove that it was so executed *bonâ fide*. It was for the plaintiff to show *mala fides*, if any. The assignment having been found to be a fair transaction, passed all the property. That was the object of the instrument, and "effects" is a very large term (*a*) to which the most extended sense should be here given. If it comprehended all, the validity of the distress becomes immaterial,

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GURNEY B. concurred.

Rule discharged.

(a) See *Dos v. Dring*, 2 M. & S. 454; *Twigg v. Potts*, 3 Tyr. 967; *Hogan v. Jackson*, Cowp. 304; *Pitt v. Shaw*, 4 B. & Ald. 206.

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## IN THE HOUSE OF LORDS.

*Between* Sir WILLIAM HORNE Knight, His Majesty's Attorney-General, Appellant; *and* WILLIAM HORN, JAMES WOOD, and JAMES BRIERLY, Respondents.

## CASE OF THE APPELLANT.

Probate duty is not payable under 55 G. 3. c. 184. in respect of personal assets of an *English* testator domiciled and dying in *England*, which being locally situate in a foreign country at the time of his death were not brought hither till after that event by his executors, though they had obtained an *English* probate in respect of his personalty situate in *England*, and proceeded by virtue of that probate to collect and administer in this country the whole of the assets.

**JOHN MARSHALL**, late of *Ardwick*, near *Manchester*, in the county palatine of *Lancaster*, was for many years previous to and at the time of his death resident and domiciled in *England* at *Ardwick* aforesaid, and had no other place of residence or domicile. *John Marshall* was a merchant trading with *North America*, and at the time of his death was possessed of or well entitled to very large personal estate and effects, amounting together to 300,000*l.* and upwards, part of which personal estate and effects was, at the time of his death, situate in this country, or on the high seas, and the residue thereof was, at the time of his death, situate in *North America*, and consisted partly of goods and effects belonging to him, and which had been sent by him to *North America* for sale, and were then remaining in the hands of his agents and unsold, at *New York* and elsewhere in *North America*; and partly of book debts and other simple contract debts due and owing to him from divers persons at the time of his death, domiciled and resident in *North America*; and partly of monies in the public funds or stocks of the *United States* of *North America*, and in the funds or stock of the state of *New York*, in *North America*, standing partly in the name of the said *John Marshall* and partly in the name of his agent there.

The said *John Marshall* duly made and published in his last will and testament in writing, and a codicil thereto, bearing date respectively the 22d day of *As-*

*gust* 1823, and the 15th day of *May* 1824, and he appointed the respondents, *William Hope, James Wood and James Brierly*, executors of his said will and codicil. The said testator departed this life on or about the 19th day of *July* 1824, without having altered or revoked his said will or codicil as to the appointment of executors; and the said executors, on the 28th day of *September* 1824, applied for and obtained probate of the said will and codicil in the proper ecclesiastical court in this country, for the purpose of administering the whole of the said testator's personal estate and effects, or so much thereof as required probate for the purpose of being administered by the said executors, and as being the proper probate for that purpose; and the said executors paid for duty on such probate the sum of 675*l.* only, and a stamp is impressed on the said probate for that amount and no more. The duty so paid by the said executors on such probate was in respect only of such part of the testator's personal estate and effects as was at the time of his death situate in this country or upon the high seas, and which was under the value of 50,000*l.*; and the said executors have never applied for or obtained probate to be granted by any other court or jurisdiction, and have never applied for or obtained any other probate than the probate hereinbefore mentioned.

The said executors, by virtue of such probate, proceeded to collect and administer and have in fact collected and have administered in this country the whole of the personal estate and effects of the said testator, whether situate in this country or elsewhere, at the time of the said testator's death, or the principal part thereof, to the amount of 300,000*l.* and upwards.

The said executors have never applied to the commissioners of stamps to pay, and have never paid any further duty in respect of the testator's estate and

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effects, in addition to the duty which they so paid, as aforesaid, and which duty was sufficient only to satisfy the debt owing to his majesty in respect of the probate duty upon such part of his personal estate and effects as was, at the time of his death, situate in this country or upon the high seas, and was wholly insufficient to satisfy any duty upon such part of the personal estate and effects of the testator as was, at the time of his death, situate in *North America*. All the said executors, at the time of the said testator's death and at the time when they took out and obtained such probate as aforesaid, were resident and domiciled in *England*, and have ever since resided and still continue to reside and are domiciled in this country.

On the 9th day of *March* 1832 his majesty's attorney-general filed an information, which was afterwards duly amended, on the equity side of his majesty's court of Exchequer, against the said respondents, thereby stating, amongst other things, to the effect hereinbefore stated, and praying that it might be declared, that a debt arose and became payable to his majesty in respect of probate duty upon the whole amount of the personal estate and effects of the said testator, including as well the personal estate and effects of the said testator, which, at his death, were situate in this country or upon the high seas, as the personal estate and effects which were then in *America*; and that such debt, in respect of the personal estate and effects of the said testator, which, at his death, were in *America*, was payable by the said respondents to his majesty, and that the same ought to be paid out of the testator's personal estate and effects, or otherwise, by the said respondents personally, and that the necessary accounts might be decreed to be taken of the testator's personal estate and effects which, at his

death, were situate in *America*, and of the amount of duty which accrued due to his majesty for probate duty upon the probate, which ought to have been taken out in respect of such personal estate and effects; and that the said respondents might be decreed to pay the amount of duty which, upon taking such accounts, should appear justly due and owing to his majesty; and that the said respondents and each of them might be restrained by the injunction of the said court of Exchequer from further administering the said testator's estate and effects, or from intermeddling therewith, until the said duty should be ascertained and paid; and, if necessary, that a receiver might be appointed of the outstanding personal estate and effects of the said testator, with all proper directions; and that the said respondents might be decreed to pay the costs of the suit. And for general relief.

The respondents appeared to the said information, and on or about the 21st day of *May* 1833 they filed a general demurrer thereto.

The said demurrer was set down for argument, and came on to be heard before the judges of the court of Exchequer at *Westminster*, in *Trinity* term 1833, when their lordships, by an order dated the 3d day of *June* 1833, allowed the said demurrer.

The appellant is advised that the said order of the court of Exchequer is erroneous, and ought to be reversed, and that the said demurrer ought to have been overruled, for the following, amongst other

REASONS:—First, because by the true construction of the acts of parliament by which probate duty is chargeable upon the personal estate and effects of deceased persons for or in respect of which probate shall be granted, such duty is chargeable and ought to be paid upon all the personal estate and effects of a testator wherever situate at the time of his death, when probate

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is granted in this country, and which are collected and got in by such executors, and are administered in this country by them under the probate.

Second, because in this case the executors having taken possession of the whole of the personal estate and effects of the testator, and having administered the same in this country under and by virtue of the probate, the whole of such personal estate and effects, including so much thereof as was situate in *America* at the time of the testator's death, must be taken and considered as the personal estate and effects for or in respect of which such probate was granted, and therefore liable to probate duty.

Third, because the said respondents not having paid probate duty upon, or rendered an account of any part of the personal estate and effects of the said testator, which were at the time of his death situate in *North America*, and which the defendants, by their demurrer, admitted to consist partly of book debts and other simple contract debts as alleged by the bill, such demurrer ought not to have been allowed, but that his majesty's attorney-general was entitled in respect of such particulars, at least, to a discovery by way of answer, and to an account or inquiry as to such particulars by the decree of the court.

(Signed) *William Horne,*  
*John Campbell.*

The demurrer was never argued in the Exchequer, but judgment was entered there for the present respondents, sub silentio, on the authority of *The Attorney-General v. Dimond* (a), it being understood that their object was to have the principles of that decision reconsidered on appeal, which could not be done in that case itself for a technical reason (b).

(a) *Ibid.*, Vol. I. 245.

(b) *Id.* 236.

The *Attorney-General* (Sir John Campbell) for the appellant, (25th July.) The testator was domiciled in *England*, appointed executors resident there, and his property in *America* being personal had no situs, but attached itself to his *English* domicile (a). The proceeds of his goods, stock, and book debts, locally situate in *America* at his death, have been received by the respondents in *England* to the amount of £50,000, more than the sum in respect of which probate duty was paid. The question therefore is, on what sum that duty was payable? *Ewing's* case (b) shows that legacy duty is payable on a bequest of stock in foreign funds by a party domiciled in *England*. It was there extra-judicially thrown out, that the probate duty would not be payable in a case like the present; an opinion which was followed up in *The Attorney-General v. Dimond* (c). That case could not be carried further by appeal, no leave having been given to turn it into a special verdict (d). This appeal is intended to review that decision. By 55 Geo. 3. c. 184. Schedule, Part the Third, duty is imposed on "probate of a will and letters of administration with a will annexed, to be granted in *England*, where the estate and effects for or in respect of which such probate, letters of administration, &c. respectively shall be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, shall be above the value of 20*l.* &c." Section 37 provides, that every person who shall take possession of, and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased, within six calendar months after the de-

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(a) See Bayley B's. judgment in *Re Ewing*, ante, Vol. I. 106.

(b) Ante, Vol. I. 91. (M. 1830.) (c) Ante, Vol. I. 243. (H. 1831.)

(d) Id. 286.

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cease, &c. shall forfeit 50*l*. Then is probate to be taken out "in respect of" personalty of the testator, which being abroad at his death, is after that event remitted to *England*? If it is, probate duty must be paid on the whole. Again, by section 38. "no ecclesiastical court or person shall grant probate or letters of administration without first requiring and receiving from the person applying for the same, an affidavit that the estate and effects of the deceased *for or in respect of which* the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other, and not beneficially, are under the value of a certain sum to be therein specified." Sections 37 and 38 apply to any part of the goods of a deceased, disposed of without probate. Any difficulty which might arise under section 38 in estimating the value of property abroad, is met by sections 40 and 41. for abating or increasing the duty according to the actual amount. Had the testator's goods been sent home in specie, could the respondents have intermeddled with them without probate, except under the penalty of section 37? or could they have maintained trover for them? *Hunt v. Stevens* (a) and *Carr v. Roberts* (b) show, that on their producing the probate for 50,000*l*. only, they must have been nonsuited for want of a larger stamp. So that when the property arrived from abroad, there must be a personal representative "in respect" of it, and it could only be dealt with by probate or administration. *Lowe and another, assignees of Stewart a bankrupt, v. Farlie*

(a) 3 Taunt. 113; see 2 M. & S. 553; 4 Camp. 272. A rule for a new trial is now, 12th January 1835, pending in the Exchequer on this point in *Montgomery v. Ashby and others*.

(b) 2 B. & Ad. 905. A new trial having been granted, a fresh stamp was imposed, and the plaintiff recovered.

*and others* (a) was not cited in *The Attorney-General v. Dimond*, and is in point. There, a testator appointed persons resident in *India* and *Scotland* his executors. The will was not proved in *England*. The executors residing in *India* having remitted money to their agent in *England*, a creditor of the testator filed a bill against that agent, praying an account, and payment of the money to the accountant-general for security. A demurrer was put into the bill, stating that a personal representative of the testator resident within the jurisdiction of the court was a necessary party to it, and that there was no such personal representative so resident a party to it. The demurrer was allowed, and the Vice-Chancellor, more particularly relying on *Humphreys v. Humphreys* (b), held that the court of Chancery could not act in allowing an account to be taken of such a property, unless a personal representative was before the court. The consequence is, that as probate could only be granted under section 38., probate duty must be paid on the whole. *Logan v. Fairlie* (c) follows up the former case. There the testator, a major in the *East India Company's* service, resident in *India*, and having all his property there, bequeathed his residue to *H. L.* resident in *England*, or, if she died before him, to her children; and appointed executors resident in *India*. The will was proved in *India*, and the residue remitted by the executors to their agent in *England*, with directions to pay it to "*H. L.* or her children." They having filed a bill against the agent to secure the fund, it was held liable to legacy duty, and that administration should have been taken out to the testator in this country, and the administrator made a

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(a) 2 Madd. R. 101. (Sir Thomas Plumer V. C. 1817.)

(b) 3 P. Wms. 349.

(c) 2 Sim. & Stu. 284, 291. *Leach* V. C. 1825, observed on by Alexander C. B. in *Re Ewing*, ante, Vol. I. 103, and by Boyley B. in *Re Bruce*, ante, Vol. III. 479.

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party to the suit. The Vice-Chancellor said, that if a part of a testator's assets is found in *England* in the hands of the executor's agent without any specific appropriation, and a legatee in *England* institutes a suit here for the payment of his legacy out of such unappropriated assets, then such assets are to be considered as administered in *England*, and the legacy duty is payable in respect of them (a). If the early case of *Jauncey v. Sealey* (b) be well reported, it is rather in point for than against the appellant. [Lord Brougham C. The testator is not there stated to have been domiciled at *Naples*.] If it is assumed that he was, then, as he had made a nuncupative will, proved there according to the custom of that country, and left no property in *England*, the *English* administration under which it was sought to make the executor who had proved at *Naples* account, might well be held to have no effect, and to be as unnecessary as if the testator died and left an estate in *Scotland*. *Yockney v. Foyster* (c) was a suit by Mrs. *Yockney*, a legatee in the will of *Foyster*, late of *Jamaica*, to obtain grant of probate in the prerogative court of *Canterbury*. The executor having appeared under protest to the jurisdiction, the first article of Mrs. *Yockney*'s allegation stated in substance, that the deceased died in 1777, having at his death personalty in the province of *Canterbury* to a value of 5*l.* and upwards, sufficient to found the jurisdiction of the court. The second, that *Foyster*, the executor, proved the will in *Jamaica*, was then resident in the province of *Canterbury*, and had had remitted to him there from *Jamaica* effects above 5*l.* in value,

(a) See *Jackson and others v. Forbes and others*, ante, Vol. II. 378. and 483.

(b) 1 Vernon, 397. (1686.)

(c) Reported in a note to *Scarth v. Bishop of London*, cor. Sir John Nicholl 1828, 1 Hagg. Rep. New Series, 651. Also stated in Tyrwhitt's note to 4 Burn's Eccl. Law, 253, 8th edit. (1824) from Dr. Battine's MSS.

and is in possession of them. The third stated the bequest: the fourth, that the legatee was advised to file her bill in Chancery to compel payment of the legacy, but was prevented from so doing on account of there not being a representative to the deceased in the prerogative court of *Canterbury*; that by the invariable practice of Chancery, no proceedings can be had or instituted therein against an executor for rendering an account or recovery of a legacy bequeathed by will, unless the will be first regularly proved in the prerogative court, and a legal personal representative be appointed to the testator by such court. The allegation was rejected and the prerogative probate refused. Sir *John Nicholl* gives this account of the case in his judgment in *Searth v. Bishop of London* (a): "In *Yockney v. Foyster*, in which I was of counsel, the party applied for a prerogative probate, the jurisdiction was denied, and was propounded in an allegation. The only effects within the province were brought there after the death of the party. Sir *William Wynne* rejected the allegation on the ground that such goods did not found the jurisdiction, and said, that though it was stated in argument that the probate was necessary in order to file a bill, yet he could not grant it on such an assertion, but if the court of Chancery had actually decided that the prerogative grant was necessary, this court, in aid of justice, might allow the grant to pass." Sir *John Nicholl* adds, "That case only shows, that for the sake of farthering justice the court would not withhold its probate." It appears then that Sir *W. Wynne* rejected the allegation on the ground that it did not sufficiently appear that a court of equity would require a personal representative in respect of the estate remitted hither. But when he says that if it was actually decided by the court of equity to be necessary, the grant of probate might be

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(a) See 1 Hagg. R. New Series, 636, 637.

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allowed to pass in aid of justice, the subsequent cases of *Lowe v. Farlie* and *Logan v. Fairlie* show, that had they been then decided, Sir *W. Wynne* would have granted probate. But it could not have been there granted in respect of any but the remitted assets. That is in favour of the appellant. [Lord *Brougham C.* What locus standi in curiâ has a person to claim discovery of assets by merely suggesting on the record that he is executor, without showing title under the seal of the ecclesiastical court by probate, or his appointment by letters of administration? Probate is not that which makes the executor or gives him capacity, as the *Scotch* phrase "confirmation" shows, but is the sentence of the court confirming an appointment of the testator, and is the only mode of establishing that sentence. Whereas the administrator takes, not under the will, but under his appointment by the sentence of the ecclesiastical court. A stranger might otherwise get hold of the property by merely suggesting that he was executor or next of kin. In this case, part of the assets were in *England* and part in *America* at the testator's death. The question is, whether in contemplation of law, where personal property is out of the kingdom, it must not be taken to follow the domicile or situs of the testator.] The cases of *The Attorney-General v. Cockerell* (a), and *Same v. Beatson* (b), show that before *The Attorney-General v. Dimond* (c), the practice and understanding were, that if any part of the personalty of any deceased person arrived in *England* after his death, unappropriated, probate or administration must be taken out in respect of it here. [Lord *Brougham C.* In *The Attorney-General v. Jackson, Forbes, and others* (d), those cases were much considered in this house on appeal from the case of *Jackson and others v. Forbes and others*, in the court

(a) 1 Pri. 165.

(b) 7 Pri. 260.

(c) *Ante*, Vol. I. 243.(d) *Ante*, Vol. III. 982. 9th June 1834. (Dom. Proc.)

of Chancery. The court of Exchequer, on my sending them a case as to those defendants' liability to legacy duty, examined the grounds of those decisions (a), and certified to me adversely to the payment of that duty. I had then the assistance of Lord *Plunkett* the Lord Chancellor of *Ireland*, and we agreed with the court below in distinguishing the case before the house from them.] In *The Attorney-General v. Jackson, Forbes, and others*, this house considered the estate as administered in *India*, and wound up there before remittance hither. A distinction may be made between stock in foreign funds, as in *Ewing's case* (b), and debts due to a testator from persons resident abroad; which latter may be considered as having been contracted in *England*. As between one diocese and another, personalty consisting of simple contract debts is considered liable to probate in the diocese where it is found; if consisting of a specialty, it is so liable where it is found. But the broad principle is, that the testator being domiciled here, all his property received here by his executors resident here, must be referred to the owner's domicile, and ought to pay probate duty.


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Sir *George Grey* on the same side. The question is, as in *The Attorney-General v. Dimond*, whether personalty of a testator, which being at his death in a foreign country, is afterwards brought here by his executor acting under *English* probate, and administered here as part of the assets, is liable to probate duty? That is a different question from one, whether property locally situate abroad is liable to probate duty, though not brought here, supposing the executor to have the power to do so. Personalty is considered to be situate where the domicile of the party is. But in *The Attorney-General v. Dimond*, the distinction which was taken as

(a) *Ante*, Vol. II. 354. (E. 1832.)

(b) *Ante*, Vol. I. 91.

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to the situs of the probate, appears grounded on this: that where a testator died in one diocese possessed of property there, and of property situate in another prerogative, probate must be taken out in order to recover the property in both dioceses, if within the same province. Here, the foreign assets were not, as in *Daniel v. Luker* (a), situated in *Ireland*, where a probate could be taken out. So, had the assets been in both provinces of *England*, probate would have been taken out in both in respect of the amount in each. [Lord Brougham C. I have no doubt that the representation is necessary. My doubt was, whether the representative capacity being once conferred, the executor is not entitled to proceed under it; but it was held in *Hunt v. Stevens*, that he cannot give evidence of his representative character quoad the fund, unless the amount of it which he seeks to recover is covered by the ad valorem stamp on the probate, which is like an unstamped instrument quoad the surplus.] Sections 37 and 38. show, that as before the executor can sue at law as such to recover the assets he must obtain probate, so it will not be granted without affidavit of the value of the property. Creditors and legatees may compel the executor to account as far as the assets extend or might have extended but for his neglect; but he will not be recognized as such till he has taken out probate in respect of something the parties are beneficially entitled to. Probate duty has in this case been paid on a part of the assets, which at the testator's death was on the high seas, though no more locally situate within the jurisdiction of the ordinary, than that which was left in *America*.

*Rolfe* for the respondent. The question is, Whether if a person dies in this country possessed of property

(a) Cited by *Bayley B.* in *Attorney-General v. Diamond*, ante, Vol. I. 347.

situate here, but entitled to property in a foreign country to a larger amount, probate is by the stamp laws to be granted only in respect of the assets in *England*, or of those in *America* also? Originally, if a party made no will, the ecclesiastical court had power to administer, and as a will ousted that power, it was afterwards thought necessary that the instrument having that effect should proceed from the same court. Its grant of probate then is only an exemplification or certificate that that court is satisfied such a will has been made as ousts its right to administer. But the jurisdiction to grant probate depends on the existence of the property within the particular ambit in which the court has jurisdiction. For if it be wholly in the diocese where the testator dies, the bishop of that diocese must grant probate; if in other dioceses of the same province, the archbishop. Suppose then a testator has property worth 20,000*l.* in two dioceses of the province of *Canterbury*, and property worth 10,000*l.* in *Ireland*, a *Canterbury* prerogative probate would be granted for the *English* property, and a probate in *Ireland* for the assets there situate. Suppose the *Irish* assets to be afterwards brought to *England*, and the executor in *England* to sue here for them, what duty must be paid on the *English* probate, in order to enable him to maintain his action, and must he pay duty on the whole amount? No *Irish* or *Indian* probate can be recognized here for this purpose, more than as a sentence of a competent foreign tribunal; and if so, according to the argument for the crown, an executor must have probate here for all *Irish* assets brought hither, and vice versa, though that would involve the paying duty twice over for the same assets. If the doctrine of the courts of law, that an executor who sues as such for 1000*l.* shall be nonsuited where the probate stamp is only for 500*l.*, is applied univer-

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sally, great inconvenience may arise. The surplus 500*l.* sued for may be for money held by the testator as trustee only, and the whole range of questions as to trusts may be involved in the indirect shape of an objection to a stamp at nisi prius, or on a motion for a new trial. But if the sufficiency in amount of a probate is to be tested by the fact, whether it is sought to recover a sum higher or lower than would be covered by the stamp produced, then an executor may in a succession of actions, each brought for a sum covered by the probate, finally recover a sum infinitely larger than that for which duty has been paid. All that *Hunt v. Stevens* decided was, that where it appeared on the probate that duty had been paid on a smaller sum than the executor was then suing for, there being no doubt that the whole was in this country at the time of granting probate, the court could not look on that as probate, and the executor could not recover. That case could not have been brought here by appeal; it turned entirely on 9 & 10 W. 3. c. 25. s. 30. which enacts, that where a stamp is necessary for any deed &c., no such record, deed, instrument, or writing shall be pleaded or given in evidence in any court, or admitted in any court to be available therein, until the vellum &c. on which such deed &c. shall be written or made, shall be stamped with a lawful stamp &c. Now the duty on probates was originally imposed by 5 W. & M. c. 21. s. 3. thus: "For every skin or piece of vellum &c. on which any probate of a will or letter of administration for any estate where the value of *20*l.** shall be ingrossed or written, the sum of 5*l.*" Now how could it appear under this act, whether the probate was granted on an estate of *20*l.** or *1000*l.** or other larger sum, unless by the chance of an action, as in *Hunt v. Stevens*? [Lord

\* See 2 Burr. in Ex. 94. 207. 208.

*Brougham C.* The want of more particular expression in the act might occasion great hardship. Suppose there had been an act of administration abroad, which under the law of the country where the assets were situate, occasioned the payment of a duty there equal in amount to the *English*, it would be hard to compel the same process to be gone through in this country at a renewed expense. Had the act stated that the duty should be paid "wherever the personal property is situate," no difficulty would have arisen.] The method of imposing the duty adopted by 5 *W. & M.* c. 21. s. 3. was continued till 1815, when the legislature intended to remedy this state of the law by 55 *G. 3.* c. 184. s. 38., which compels an affidavit of the amount of property for which a probate is required. That oath is meant to be conclusive of the amount of duty to be paid, subject to the correcting any error which may eventually appear. [Lord *Brougham C.* If the oath is so far conclusive, still under 55 *G. 3.* c. 184. s. 43. the respondents may be liable to penalties for not paying up the additional duty on the *American* assets, provided that probate ought at first to have been taken out in respect of them. I do not receive *The Attorney-General v. Dimond* as authority, though entitled to great respect, because it was never acquiesced in, and would have been appealed from had the state of the record admitted. To *Ewing's* case no such considerations attach, and it is entitled to great weight. But supposing the rule laid down in *The Attorney-General v. Dimond* to be correct, a man domiciled in *England* might, during a long illness, transfer his *English* into foreign stock, and then on his death here no probate duty would be payable, though he was domiciled in *England*, and appointed executors resident here.] That objection would have more force if this were a case of

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legacy duty. In *Ewing's case* (a), *Alexander C. B.* says, "It is contended that the fund in this case is not liable to legacy duty, because the duties on probate and administrations would not have extended to this particular fund; perhaps not, but that makes no difference in this case. It is so expressed in the act, that the duty on the probate is only imposed in respect of that fund which the executor or administrator is to obtain in a province of this country by force of that probate or administration obtained in *Canterbury*, for instance; so that though there may be a great personal estate in the county of *York*, the duty on that estate is not paid till an administration is taken in the province of *York*, and vice versa; and it is only on the recovery of those sums in those parts of the country where the probate is granted by force of that particular probate, which by our constitution is confined to particular provinces, that the duty is payable; for where 55 *Geo. 3. c. 184. Schedule, Part III.* directs the letters of administration, it says, 'where the estate or effects for or in respect of which such probate &c. shall be granted or expedied,' evidently confining the charge on the probate to those particular estates to be recovered of right by force of that administration; but when it speaks of the legacy duty, it is charged on the amount of the estate itself, to be handed over on the receipt, which the executor, to save himself from the penalty of 36 *G. 3. c. 52. s. 28.* ought to take before he pays the money. I cannot doubt therefore, in that particular case, that legacy duty is chargeable on this property." The judgment of *Bayley B.* is strong to the same effect (b).

In *The Attorney General v. Dimond* it was urged for the crown, that a probate was necessary to sustain an action by executors for the assets, and *Logan v. Fair-*

(a) *Ante*, Vol. I. 104.(b) *Id.* 107.

*Zie(a)* was pressed on the court. But assuming that a party suing as a representative, must show that he has clothed himself with that character by virtue of administration granted by some competent authority in this country, the question here is, not whether he has done so, but in respect of what property is the instrument conferring or limiting that representative character granted? and what probate duty should have been paid at the moment it was granted? That depends on the words of 55 G. 3. c. 184. Schedule, Part III. Where there are assets in a foreign country as well as in this country, probate duty is not of necessity to be paid on the foreign assets; for if it is all duly administered there without ever being brought here, it is not contended that probate duty would be payable here. Now though by sect. 43. a mistake in the executor's first estimate of the amount of the assets may be rectified by him, there does not appear any power to rectify such a mistake in consequence of any thing, *e.g.* the bringing foreign assets to this country, occurring after payment of that duty which was the right duty at the time the grant of probate was made. Nothing in the act makes a fluctuating duty payable in respect of the locality of the property varying from time to time. The form of affidavit required by the ecclesiastical court in pursuance of sect. 38. is of the value of the estate which the deceased died entitled to, "and for or in respect of which a probate of the will is to be granted." No difficulty remains how to ascertain whether the assets are administered in the foreign country where they are, or are brought hither; for that was a fact contemplated by the legislature, as capable of being ascertained at the time of making the affidavit. [Lord Brougham C. The principle on which the judgment in *The Attorney General v. Dimond* pro-

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ceeds, is this; probate is the act of the ecclesiastical court in respect of property locally situate within its jurisdiction, confirming the testator's appointment of an executor. That confirmation is more than form, for without it he cannot get at the substance, while, as soon as it is granted, he becomes universally executor and personal representative by force of the will. The court does not confer the power as in case of administration, but recognizes him as being the executor whom the testator directed to represent him. That can have no effect on the administration of the property here or abroad. I have always considered a man's personalty to have no situs but his: for though if *A.* dies in the diocese of *Norwich*, and his debtor is resident in another diocese of the same province, it is considered as situate in the diocese where he lives, and that is the principle by which particular and universal administration is granted; it may follow notwithstanding, that though to give a general jurisdiction it is required that there should be bona notabilia within some district, yet when once the jurisdiction accrues, the grant of probate may have universal effect with reference to the will, and will enable the representative, when he comes into the court of Chancery, to call over from abroad and distribute here all the foreign assets. The grant of probate is only in respect of the goods situate within the jurisdiction of the court. Now if a man die in *England*, possessed of goods situate here and worth 10,000*l.*, and of other goods in *Ireland* worth 20,000*l.*, and probate is taken out here, and in *Ireland* under 56 *G. 3. c. 56.* in respect of the assets there, and that the latter are afterwards brought hither, cannot the executor recover them here without *English* probate, and paying further duty? The court would look to the point, whether all that is required by the competent courts of *Ireland* or other countries, had

been done. The question remains on the words of the schedule of 55 G. 3. c. 184, what are "the estate and effects for or in respect of which administration is granted." Nothing shows that it was intended to include any other property than that situate within the ecclesiastical jurisdiction, which should grant probate at the time of such grant.

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*Wigram* on the same side. No question is here to be argued, whether debts owing by a person in *America* to another here, were to be taken as property there or here. The act 55 G. 3. c. 184. is penal, and must therefore be construed strictly. Domicil decides the question of legacy duty; *Ewing's* case. (a) *In re Bruce* (b), was precisely the reverse of *Ewing's* case, and the domicil being *American*, it was held no legacy duty was payable. That being the law, can any analogy be drawn from it in a case of probate duty? Now the terms in which duty is imposed on legacies, seem to contemplate a certain particular class of persons, without intention to impose duty on foreign property. Now the probate duties are imposed on the "estate or effects, in respect of which probate &c. is granted." What they are, can only be known *aliunde*, and from the law of the courts at the time of passing 55 G. 3. c. 184. *Yockney v. Foyster* (c) distinctly applies, and the practice of the present day is to grant probate in respect of property having a certain situs only. Where a person died possessed of property in several dioceses of a province, strictly speaking probate must have been granted by the ordinary in each, quoad the assets situate there, had not the prerogative probate been provided. Probate is granted simply to show the admission by the ordinary, that his right

(a) *Ante*, Vol. I. 91.

(c) 1 Hagg. R. New Series, 636.

(b) *Ante*, Vol. II. 375.


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to administer is displaced as to the property, which but for the will he would have administered. [Lord Brougham C. When the origin of the ordinary's right to administer is considered as being *pro salute anime*, it clearly did not always depend on the local situation of the assets. In early times, had a deceased had debts due to him abroad, the ordinary would doubtless have taken steps to levy them.] Whether the ordinary could at any time levy them out of his diocese, may be questionable. But suppose assets transferred to this country from *Ireland*, after probate granted, must they be liable to pay a second probate duty, before they can be recovered in this country? That is the point looked to in *The Attorney General v. Dimond*, where the actual situs of the assets at the death is held to be the place at which probate duty is to be paid. The fact, that when executors sue by force of probate, the courts require it to be proved by producing a stamped probate, only shows that they require it to be shown by evidence of a particular kind only, that the ecclesiastical court has confirmed the executor's appointment under the will, as evidence of plaintiff's title to sue. [Lord Brougham C. In *Hunt v. Stevens* and *Carr v. Roberts* the representatives were held to be clothed with that character to the amount of the stamp on the probate, and no further.] The plaintiff's character as representative was nevertheless admitted: and supposing he had paid probate duty for all the assets for which he did not sue as trustee, could he not use the probate to sue as trustee for the remainder? Those cases do not touch this question, whether personality locally situate abroad, at the owner's death here, is liable to probate duty. The necessity for probate does not conclusively prove that probate duty is payable. Thus, though probate is required in order to enable an executor to sue in respect of a term vested

in the testator, no duty is payable. The demurrer admits the facts stated in the information, but not inferences of law. The *English* probate has scarcely been ancillary to realizing the *American* assets in *America*, which was effected under the will by virtue of an *American* probate; and the proceeds, when they arrived here, were not like debts collected here, which might be considered *bona vacantia*, but came to the executor's possession under the foreign probate.

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The *Attorney General* replied.

The LORD CHANCELLOR.—My lords, in considering this case, which comes by appeal from a decision of the court of Exchequer, it is necessary that I should remind the house, as I did on a former occasion, of *The Attorney General v. Jackson (a)*. That was a decision appealed from, which took place in a court entitled to the greatest respect, not merely in reference to the matters which more ordinarily come before the courts of this country, but in reference particularly to matters of revenue, inasmuch as their legal jurisdiction leads them especially to the handling questions of that description. It was upon that ground I felt, though there were certain doubts in my mind on a comparison of the cases of *The Attorney General v. Cockerill*, *The Attorney General v. Beatson*, and other cases, with the decision of the Exchequer in *Jackson v. Forbes (b)*, which was a case sent there from the court of Chancery, that it must be, as I then stated, a very clear opinion, by every one confidently entertained, and without any hesitation, that should entitle me, and therefore incline me to advise your lordships to differ from that court on a solemn judgment delivered, after hearing all which could be urged on both sides. Nevertheless, this house is bound in this case, as in all others, to judge

(a) *Ante*, Vol III.. 992.

(b) Vol. II. 254.

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for yourselves in the same manner as the court below; and if, on serious consideration, I cannot bring my mind to think that they have well decided this case, it will be my duty to represent that to you. I shall therefore take time to consider the arguments which have been urged, to examine the statutes and authorities, and to make every inquiry of the very learned civilians at the head of the ecclesiastical courts upon some matters which have been brought into discussion in argument here, but which do not appear to have been touched upon in the court below. The question in the mode of stating it is put on its right footing, viz.: whether in respect of the 300,000*l.* or any portion of that amount, a probate was granted? If it was granted in respect of all that money, cadet questio, and probate duty is clearly payable; if it was not so granted the subject of probate is at an end, and the duty is not payable. The *Attorney General* agrees that this is the right way of putting the question, but attempts to limit that by the pleadings, and to leave the general question open to argument, though this probate was allowed to be granted in respect of the property in question. He has recourse to an argument in which I do not go along with him, although I do in a great deal of his argument as to the locality or non-locality and the shifting nature of personal property in general. He says, look at the information and you will see the demurrer confesses the facts; you will see that by the information it is alleged, and therefore by the force of the demurrer must be taken to be admitted, that it was in respect of this probate, or by force and effect of it, that possession of the *American* fund was obtained by the party; therefore, he argues, it follows that the probate was granted in respect of that foreign fund. My lords, I do not go along with him in that view of the case. It may be very easily conceived that the probate was granted in respect of goods and chat-

tels locally situate within the bounds of the *English* ecclesiastical jurisdiction, and in respect of nothing else, but that that probate so granted here, and to that limited extent, may have been used elsewhere for another purpose, and with respect to other property out of the ecclesiastical jurisdiction; and that by means of making use elsewhere of a probate granted alio intuitu by the ecclesiastical court, the possession of the effects there situate may have been obtained, though the probate was not granted in respect of that foreign property. But assuming the fact of a probate being used for one purpose abroad, though it was granted for another at home, it does not by any means follow that the person possessing the probate, having used it for the purpose of getting in a foreign estate, and being enabled by that means to get it in, must be said to have obtained it for the sake of getting in that foreign estate, and is not decisive at all of the question. I shall only throw it out to disembarass the case of that argument. I was very much impressed with the argument as to the nature of the probate granted by the ecclesiastical court, and the ground for granting it, as connected with the jurisdiction of that court. If I could be satisfied that at any time the ecclesiastical court has so far forth-taken into its view goods or personal estate of a testator or an intestate locally situate beyond its jurisdiction, and that before or after the period of its having granted probate, or when it was administered in pios usus pro salute animæ, it could be shown that they had drawn over to the same uses property situate out of their own jurisdiction, or that having possessed themselves of that which was within their grasp at the time of the death of the party, they had afterwards extended their hand abroad so as to get possession of that which, at the time of the death, was not within their jurisdiction, and had taken that for them-

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selves, that would go a very great way in support of the *Attorney General's* argument, and would be nearly conclusive, as it would almost entirely displace the ingenious arguments for the respondents. This is just a matter not merely of antiquarian curiosity but bearing most materially upon the case. I shall take care to ascertain the opinion of the learned judges of the ecclesiastical courts upon the extent of ecclesiastical jurisdiction in former times. If I shall find that it did not exist over property beyond the limits of the court's jurisdiction, there will arise another difficulty which is thrown out by the *Attorney General*, viz. what became of the assets if the ordinary did not get them? they were not bona nullius or bona vacantia, and as such belonging to the crown. There must be some administration, some mode of dealing with it; and if that is not of a local nature, or limited by the extent of the diocesan's jurisdiction, who originally assumed to administer, and subsequently has granted probate to the executor confirming the appointment of the deceased, or letters of administration to an individual appointed to discharge the duty in relation to that property; the difficulty is to see by what rule it is to be determined.

My lords, these are the points I wish to look into, and I shall do so carefully, because though the case depends much upon them, they do not appear to have exercised the ingenuity or learning of the counsel below in *The Attorney General v. Dimond*, or to have formed any ingredient in that decision, though delivered by the lord chief baron, as head of the court, after time taken for consideration. Whether it was reduced into writing before it was pronounced is quite immaterial. Mr. Baron *Bayley* threw out in the course of the arguments various interlocutory remarks, some of which are valuable. I have looked at them with

reference to the judgment of the court, and I think I can trace the substance of them in it.

My lords, I shall take every means in my power, before I move your lordships to proceed to judgment, whether probate is to be considered as limited or unlimited, as restricted to the personal estate of the testator in the diocese at the time of his death or otherwise. The case may very probably, if not altogether, depend, or at all events turn very materially upon the inquiry which I have stated I shall deem it proper to make, I mean as to what was formerly the extent of the jurisdiction of the ecclesiastical court, and the mode in which it dealt with assets situated in a foreign country at the time of the individual's decease. Upon these grounds, therefore, I shall move that the further consideration of this question be postponed.

Further consideration postponed.

On the 12th August 1834,

The LORD CHANCELLOR said,—This was an appeal from the unanimous judgment of the court of Exchequer, upon an information filed by his majesty's *Attorney-General*, for the purpose of obtaining payment of probate duty in respect of assets of the testator, which at the time of his decease were situate without the jurisdiction of the court. When the case was argued, I entered at some length into the subject, and the reasons adduced on both sides, and stated that I could not agree with the argument urged by the *Attorney-General* in his reply, and that I did not think that the use that had been made of the probate, was a test of itself sufficient to demonstrate the purpose for which the probate had been granted. The words of the act refer not to the use eventually made of the probate, but distinctly

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to the purpose for which it was granted, by which it appears, what was in the mind of the court at the time of granting the probate, which is the judgment of the court granting it. The words of the schedule are to be the rule upon the present occasion, and they do not appear to me to show, though the probate has been funds, that it is to be any test whatever in trying whether eventually *de facto* made available to collect foreign or not, this case of foreign funds comes within the schedule, by reference to the purpose to which it was granted, or to which it was applied.

It appeared to me, that much must depend upon the course of practice of the ecclesiastical court in matters of probate, and whether it assumed a jurisdiction co-extensive with the estate of the deceased party, whose will was brought for proof. If it assumed to deal with the property, or in any way to hold it as within its reach, then it might be said that the probate attached to the property wheresoever situated; that it bore relation to the property, that it was granted in respect of it, and that the duty would attach. But if, on the other hand, it should be found that in fact the probate was merely granted in respect of the personalty at the time of the death in the ordinary jurisdiction, then *cadet questio*, for by parity of reasoning, though on the contrary side, this is not a case that comes within the words of the schedule of 55 G. 3. c. 184. and consequently no probate duty attaches.

Now, it was, I think, justly maintained, that the probate is granted by the ordinary, and taken upon him in respect of the ancient practice which arose in popish times, from the interest which the ordinary had in the personalty of individuals to be applied to pious uses for the safety of the souls of those individuals. That is, probably, the origin of the probate duty, which gave

the clergy a great interest in personalty; the pious uses they applied them to is needless to inquire into. But from that arose what the present case depends on, that is, the necessity of a probate relinquishing the ordinary's right to the property, and vesting it in the administrator or executor by granting probate with the will annexed, or granting administration, if there was no will, and conferring that authority on another, from whence arose in later times the claim of the ordinary to vest the claim in other parties.

Now, if the ordinary could only lay claim and never did lay claim to any thing beyond the goods of the party in his jurisdiction at the time of his death, if he never thought of calling for foreign funds and laying his claim to them for pious uses, because the death took place in his jurisdiction, it clearly appears by the force of the argument I have now used, that the probate would not be granted except in respect of those goods in his jurisdiction; and if so, the probate duty cannot attach, and there is a clear omission. I believe the statute meant that it should attach, but if the legislature has used language insufficient for the purpose, the payment cannot be enforced.

I have made inquiry of two very learned authorities, and have also referred to the king's advocate, and they explicitly corroborate my view of the confined and restricted jurisdiction, and of the nature of the ordinary's office, and the goods in respect of which the probate is to be granted.

That of itself would be a strong ground for my affirming the decision of the court below, but I will not conceal from the house another reason which operates very strongly on my mind. Unless it was quite clear there had been a miscarriage below (and I used the same argument in *The Attorney General v. Jackson* with

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the perfect concurrence of the Lord Chancellor of *Ireland*,) I should hold it would not be advisable to shake the decision of the court of Exchequer pronounced by one of the judges on behalf of his brethren, after full argument, great deliberation, and time taken to consider, upon a revenue question, that being a matter which more especially belongs to and is competent to their jurisdiction. But I have no clear opinion that the court of Exchequer has miscarried; and without saying that the case is free from difficulties, or that there are things that are not explained, as well as one or two dicta in *Ewing's* case, and *Logan v. Fairlie*, which conflict with each other upon the subject, still they are not sufficient to furnish ground for reversing the decision of the court below; and upon the whole I recommend to your lordships to affirm it without costs.

Judgment affirmed without costs.

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[The following cases, which, from the difficulty of procuring papers at the exact time when they were required, were not reported in their proper places in *Easter and Trinity terms*, are now added to close the fourth volume, with an Index. To prevent mistakes, the date on which judgment was delivered in each case is added to it.]

LEWIS against GRACE MORRIS and LLOYD ROBERTS.

CASE. The declaration stated that the defendant *Morris*, by judgment of the court of Exchequer, had recovered 150*l.* debt, with 8*l.* 4*s.* 6*d.* damages and costs against the plaintiff, and that she and the defendant *Roberts*, as her attorney in that behalf, had wrongfully sued out of the said court two writs of ca. sa. which were running at the same time, one a testatum ca. sa. directed to the sheriff of *Carnarvonshire*, the other a similar writ directed to the sheriff of *Anglesea*, both returnable on 2d November 1832; which writs were respectively delivered to the said sheriffs respectively to be executed in due form of law, and were indorsed respectively with directions to levy 21*l.* 4*s.* 6*d.*, besides costs, &c. It then stated that the sheriff of *Anglesea* on 1st November, after the delivery to him of the said writ, and before its return, arrested the plaintiff by his body, and had and detained him in custody in execution

Two writs of ca. sa. were issued at one time into *Anglesea* and *Carnarvonshire*. The debtor was arrested in *Anglesea* on 1st November, and having paid debt and costs to the sheriff, was discharged. The next day he was arrested in *Carnarvonshire* on the other ca. sa., and was detained in custody till the 15th, when the debt and costs were paid over to the creditors'

attorney, several days after he had been acquainted with the previous facts. The debtor then sued the creditor and her attorney in case for malicious non-feazance, in not giving notice to the sheriff of *Carnarvonshire* that the writ issued into *Anglesea* had been executed or the judgment satisfied, and that the writ directed to him was not to be executed: Held, that in the absence of proof that before the second arrest any notice had reached the creditor or her attorney of the first arrest, or of the payment of the debt and costs, or that at any time before his discharge the plaintiff had applied to either for a countermand of his imprisonment, which had been thereupon maliciously withheld, he could not maintain the action.

*Semble*, the discharge by the sheriff of *Anglesea* without consent of the plaintiff was illegal.

*Semble*, also, that the second arrest might have been set aside on application to a judge.

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for the said debt and damages so indorsed as aforesaid, and executed the said writ, and the said judgment was then and there satisfied, whereof the said defendants then and there had notice. And the said defendant further saith, that the said writ directed to the said sheriff of the said county of *Anglesea* having been executed as aforesaid, and the said writ directed to the said sheriff of the said county of *Carnarvon* having been so issued as aforesaid and delivered as aforesaid, it became and was the duty of the said defendants who had so issued the said two writs respectively to give notice to, and to instruct and inform the sheriff of the county of *Carnarvon*, that the said writ so issued directed to the sheriff of the said county of *Anglesea*, had been as aforesaid executed, and the said judgment as aforesaid satisfied, to prevent the said plaintiff from being taken by his body under the said writ so directed to the sheriff of the said county of *Carnarvon*; yet the said defendants, well knowing the premises, but wilfully and maliciously intending to oppress, harrass, and injure the said plaintiff, and to cause him to be imprisoned and detained by the said sheriff of the said county of *Carnarvon*, under and by virtue of the said writ directed to him as aforesaid, without any reasonable cause whatsoever, did not nor would give notice to instruct or inform the said last-mentioned sheriff that the said writ directed to the sheriff of the county of *Anglesea* had been executed as aforesaid, or that the said judgment had been satisfied as aforesaid; neither did they or either of them give notice to the sheriff of the said county of *Carnarvon* not to execute the said writ so directed to him as aforesaid, but wrongfully and maliciously refused so to do: and thereupon, by reason of the premises, the said writ directed to the said sheriff of the county of *Anglesea* having been so

executed as aforesaid, for want of such instructions or information as aforesaid, the said sheriff of the said county of *Carnarvon*, under and by virtue of the said writ so to him directed as aforesaid, afterwards, and after the execution of the said writ so directed to the said sheriff of the said county of *Anglesea* as aforesaid, to wit, on &c., in the county of *Carnarvon*, to wit, in the county of *Flint*, took and arrested the said plaintiff by his body, by virtue of the said writ directed to him as aforesaid, and the indorsement thereon, and took and detained him in custody for a long space of time, to wit, for the space of twenty days then next following, and by reason of the premises the said plaintiff was wrongfully and maliciously so kept and detained in custody as aforesaid, and was prevented all that time from conducting his own affairs and business, and has been otherwise greatly injured and damnified. Plea: general issue.

At the trial before *Gaselee J.* at the summer assizes for *Flintshire* in 1833, it appeared that the defendant *Morris* having in *Trinity* term 1832 recovered judgment against the plaintiff for 58*l.* debt and costs, the other defendant, as her attorney, took out execution by issuing at the same time two writs of ca. sa., one into *Carnarvonshire* the other into *Anglesea*. The plaintiff being arrested at *Beaumaris* in *Anglesea* on 1st *November* 1832, paid the debt and costs to the under-sheriff, who thereupon let him go without consent of *Morris*, the plaintiff in that action. Next day the plaintiff was arrested on the other ca. sa. at *Carnarvon*, a few miles from *Beaumaris*, and was kept in custody there that day. The next morning a person from the office of the under-sheriff of *Anglesea* brought a letter to *Carnarvon*, directed to the defendant *Roberts*, stating that the plaintiff had been arrested in *Anglesea* and

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the debt and costs (a) had been paid, which the sheriff would send over to *Roberts* on the first opportunity. The defendant *Roberts* being alleged to be absent, the messenger informed his clerk of the facts. On the 9th the defendant *Roberts* was personally informed of them, but refused to order the plaintiff's release till he had the debt and costs paid to him. The plaintiff remained in custody till the 15th *November*, when the defendant *Roberts* having given notice to the sheriff that the debt and costs had been that day paid into his hands as attorney for the defendant *Morris*, the plaintiff was discharged. The sheriff of *Cornwallshire* had received notice on the 2d that the debt and costs had been paid. For the defendant it was urged, first, that the plaintiff should be nonsuited, on the ground that payment to the sheriff of *Anglesea* on the ca. sa. was not such satisfaction to the plaintiff in the action as authorized his discharge without the plaintiff's privity or order, *Stamford v. Davies* (b) and *Taylor v. Baker* (c); and, secondly, that there was no such evidence of that malice of the defendants which would alone sustain an action of this nature (d). The learned judge expressed his opinion that the sheriff of *Anglesea* was not by law justified in releasing the plaintiff; but after reserving the point, whether the defendant *Roberts* ought to have discharged the plaintiff on the 9th, left the question of malice to them upon the facts. The jury found that there was no malice, and gave a verdict for the defendants, subject to a motion to enter a verdict for plaintiff for one


(a) See per *Buller* and *Heath* Js., 1 B. & P. 392.

(b) 2 Freem. R. 432.

(c) Id. 453, cited per *Cur.* in *Slackford v. Austen*, 14 East, 471, 474. See *Tidd*, 9th ed. 1029. See the case also reported 2 Med. 214. *T. Jones*, 97. 2 Lev. 203. 3 Keb. 748, 788.

(d) 3 East, 314. 1 B. & P. 388.

shilling damages, if the court should think either defendant liable at law, after the jury had negatived malice. A rule having been accordingly obtained to enter such verdict or for a new trial,

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J. Jervis and *J. H. Lloyd* showed cause. The discharge of the plaintiff by the sheriff of *Anglesea* before paying over the debt and costs to the defendant *Morris* in satisfaction of her claim in that action, so as to make it imperative on her to sign an authority to the sheriff for his discharge, was a voluntary escape; *Slackford v. Austen* (a), *Crozer v. Pilling and Moore* (b). The mere issuing concurrent writs of execution, without acting on them both at the same time, is not illegal; *Hodgkinson v. Walley* (c), *Miller v. Parnell* (d). In *Scheibel v. Fairbain and another* (e) it was held, that case would not lie against a party suing out a *capias ad respondendum*, if he neglect to countermand it after payment of the debt; at least, unless malice be averred. Now it is not proved or can it be inferred that at the time of the second arrest the defendants knew that the *ca. sa.* had been executed and the debt and costs paid the day before in the adjoining county, nor could they presume the plaintiff to be at large under circumstances amounting to voluntary escape. No proof appeared that malice was entertained by these defendants against the plaintiff, whereas in *Crozer v. Pilling* such circumstances appeared. Then the simple question was that which was settled in the negative by *Slackford v. Austen*, viz. whether the sheriff of *Anglesea* was an agent of the plaintiff for receiving the money sought to be reco-

(a) 14 East, 468. (b) 4 B. & Cr. 26. (c) *Ante*, Vol. II. 174.

(d) 6 Taunt. 370. 2 Marsh, 78, S. C. See 9 Pri. 5.

(e) 1 B. & P. 388.

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vered on the ca. sa.? The duty of that sheriff was "to keep the plaintiff's body, so that he might have it at a certain day at *Westminster* to satisfy the plaintiff of his damages," unless he previously received the plaintiff's authority for discharging him.

R. V. Richards (Follett with him) contra. Though it may be usual in practice to issue concurrent writs of execution, no entry of more than one is made on the judgment rolls. In *Miller v. Parnell* (a) it was held, that mere abandonment of seizure of goods taken under a writ of fieri facias, was not sufficient to justify the taking the defendant in execution under a ca. sa. before the writ of fi. fa. was returned. Then the execution of the ca. sa. by taking the plaintiff in *Anglesea* was an execution of the other, it being returnable at the same time; so that it became functus officio, and the plaintiff was driven to take out fresh process of execution after the return of the first. In *Hodgkinson v. Walley* (b) *Bayley B.* says, "There is no doubt that a fi. fa. and ca. sa. may issue together and be concurrent, for if nothing is done on either, no award of execution is entered on the roll. But if one is executed, a return of that must be entered before you can so enter the award of another execution. Now if both are executed concurrently, the entry on the roll must be that both were awarded and issued on the same day, which would be irregular." The entry on the roll in this case would be of an award of a ca. sa. into *Anglesea*, as the first caption took place there; and then of another into *Carnarvonshire*, where the plaintiff was secondly taken. As to malice, the detention of the plaintiff from the 9th to the 15th was wrongful, for the payment of debt and costs was known to the defendant *Roberts* on the former day; then

(a) 6 Taunt. R. 370.

(b) *Ante*, Vol. II. 175.

being wrongful, it must be presumed to have been malicious, in the absence of any circumstance to rebut the presumption of malice; see per Lord *Tenterden* and *Littledale J.* in *Crozer v. Pilling* (a). [*Alderson B.* The jury in that case found malice; a result nearly inevitable, as *Pilling*, after having obtained the fruits of his judgment, refused to give an order for his debtor's discharge. Here, as soon as the plaintiff's attorney (b) was satisfied, and as soon as the jury thought he ought to have been satisfied, the plaintiff was discharged. *Parke B.* There is another case in the Common Pleas, *Gibson v. Chaters* (c), and one in K. B., *Page v. Wiple* (d), confirming *Scheibel v. Fairbain*. It was the duty of the person in custody to satisfy the plaintiff that he had been previously arrested and had paid the debt.]

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PARKE B. (e).—It appears that in this case two writs of *capias ad satisfaciendum* were issued at the same time against the plaintiff into *Anglesea* and *Carnarvonshire*, as by the practice may be done. The plaintiff being arrested on the 1st *November* by the sheriff of *Anglesea*, paid him the amount of the debt and costs, and was thereupon set at large by him. That, according to the cases cited at the trial, was a voluntary escape by the plaintiff, after which the sheriff of *Anglesea* could not have re-taken him (f); it however happened that the next day, after having passed into *Carnarvonshire*, he was again arrested on the second concurrent writ of *ca. sa.* It appeared that on the evening of that day, the 2d of *November*, some notice from the

(a) 4 B. & Cr. 32, 34.

(b) See per *Cur.* 4 B. & Cr. 28.

(c) 2 B. & P. 129.

(d) 3 East, 314.

(e) 1st May 1834. Lord *Lyndhurst* was sitting in equity.

(f) See *Ravencroft v. Eyles*, 2 Wils. 295; *Featherstonhaugh v. Atkinson*, Barnes, 273, cited by Lord *Kenyon* in *Atkinson v. Jameson*, 5 T. R. 25. See *Carter*, 112. *Willes*, 459. 2 T. R. 172. *Allanson v. Butler*, Sid. 331. *Bac. Ab. tit. Escape in civil cases* (C).

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under-sheriff of *Anglesea* that the debt had been satisfied had reached the office of the then plaintiff's attorney *Roberts*, but no such notice had been given before the second arrest took place. The parties here made defendants cannot be liable for the first arrest, or for that which took place on the second process, because it did not appear that notice had been previously given to the creditor or her attorney of the execution of the first: nor for the detention after notice, because the jury have negatived malice. The cases of *Scheibel v. Fairbain* (a), *Gibson v. Chaters* (b), and *Page v. Wiple* (c), have established that the plaintiff's neglect to countermand the execution of process even after payment of the debt to himself or his agent, does not make him liable to an action, unless it be proved that there was malice in so doing. In this case it necessarily became a question for the jury, whether the defendants were actuated by malicious motives or not. They found in the negative, and I concur in their decision; for the discharge of the plaintiff took place as soon as the plaintiff's attorney was perfectly satisfied that the first process had been effectual in procuring the payment of debt and costs; and the payment to the sheriff of *Anglesea* was no payment in law to the plaintiff himself. On the authority of the two cases in the Common Pleas, it is clear that the action will not lie; *Hodgkinson v. Walley* (d) has however been cited to prove that a plaintiff cannot act on two concurrent writs of *fi. fa.* and *ca. sa.* at the same time, or on one, after the other has been executed. This case could only be an authority for an application to discharge the defendant out of custody on his second arrest. But the present is a special action on the case, which cannot be supported unless the counter-

(a) 1 B. & P. 388. (b) 2 B. & P. 129. (c) 3 East, 314.

(d) *Ante*, Vol. II. 174.

mand of the second arrest of the plaintiff, or of his detention after it, should be found to have been withheld by the defendants on malicious motives. The reverse having been found by the jury, this rule must be discharged.

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BOLLAND, ALDERSON, and GURNEY Bs. concurred.

Rule discharged (a).

(a) See a case where a plaintiff was held not to be passive, but liable as an actor for the act of his attorney's agent in signing judgment against a defendant before his appearance; *Bates v. Pilling*, 6 B. & C. 38.

WALKER *against* JONES and Others.

DETINUE. Second plea, that the plaintiff did not deliver the said goods and chattels to the defendants. General demurrer.

In *detinue*, a plea that plaintiff did not deliver the goods to the defendants, is bad on general demurrer.

Lord LYNTHURST C. B.—The plea is bad, for the detainer, not the bailment, is the matter material to be traversed. That appears from *Gledstane v. Hewitt* (b), and from *Kettle v. Bromsall* (c), and *Brook's Abridgment*, tith. *Detinue*, pl. 50., and *Charters de Terre*, &c. pl. 22., there cited.

Plea struck out on payment of costs.

Comyn appeared in support of the plea, *Mansel* in support of the demurrer.

(b) *Ante*, Vol. I. 445.

(c) *Willes R.* 118.

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An increased poor-rate having been assessed on certain premises, an appeal against it was entered at the next sessions and there respited, but no notice in writing of that appeal was given to the overseers under 41 G. 3. (U. K.) c. 23. s. 2. Before the hearing of the appeal the overseers distrained for the increased rate; the amount was paid under protest, and possession of the distress was thereupon relinquished. The rate was afterwards reduced by order of sessions, in consequence of a decision of the King's Bench. An action having been brought by the rate-payers against a person who was overseer at the time of the distress, to recover the surplus as for so much money had and received by him to their use: Held, that no notice of appeal having been given to the overseers, pursuant to the statute, the action would not lie.

THIS was an action of assumpsit brought by the plaintiff as clerk to the undertakers of the *Aire and Calder* Navigation, who were authorized by their act of parliament to sue in his name, for money had and received by the defendant for the use of the said undertakers, and on an account stated. At the trial before the Hon. Mr. Justice *Alderson* at the Lent assizes for *Yorkshire* in the year 1833, a verdict was found for the plaintiff for 163*l.* 3*s.* 3½*d.*, subject to the opinion of this court on the following case.

On 15th *August* 1828, the overseers of the poor of the township of *Brotherton* in the county of *York*, of whom the defendant was one, duly made and published a rate for the relief of the poor of the said township, in which they rated the said undertakers at the sum of 150*l.* in respect of property of the annual value of 2000*l.* Against this rate the said undertakers entered an appeal at the *October* sessions 1828, which appeal was respited till the following sessions of *January* 1829. On the 15th of *December* 1828, after summons and refusal to pay, a distress was duly made by the said defendant, who was one of the overseers of *Brotherton*, on a vessel belonging to the said undertakers, for 150*l.*, being the amount of the said rate; and, to prevent a sale, the sum of 163*l.* 3*s.* 3½*d.*, being the amount of the said rate, and of the expenses of the said distress, were paid to the defendant, being still overseer of the poor, who was at the same time served with a written protest signed by the company's clerk, and expressed to be on

behalf of the undertakers of the *Aire and Calder* Navigation.

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“ I do hereby tender you the sum of 150*l.* for which you have distrained the goods and chattels of the said undertakers, and also the sum of 13*l.* 3*s.* 3½*d.* for costs of distress, making together the sum of 163*l.* 3*s.* 3½*d.* ; but I do on their behalf hereby protest against your right to recover the same by the illegal distress you have made ; and I do hereby give you notice that an action will be brought for restitution and for damages. Dated 15th *December* 1828.”

And the defendant on that occasion gave a receipt for the said sum of 163*l.* 3*s.* 3½*d.*, of which the following is a copy.

“ Received the 15th *December* 1828, of the *Aire and Calder* Navigation (by payment of *J. P. S.*), the sum of 150*l.* claimed and distrained for by the township of *Brotherton* for poor-rates, upon the undertakers of the said navigation, together with 13*l.* 3*s.* 3½*d.* for costs attending the distraining the same.

£150 0 0	(Signed)	<i>E. W.</i> , one of the over-
13 3 ¾		seers of the poor of the
— — —		said township of <i>Bro-</i>
£163 3 ¾		<i>therton.</i>

At the *January* sessions 1829, the rate was confirmed by an order of sessions, subject to a case for the opinion of the court of King's Bench (*a*) ; and whilst the decision of this case was pending, viz. on 27th *March* 1829, another rate was made by the overseers

(a) See *Rez v. Justices of St. Peter's Liberty*, York, 4 B. & Adol. 342.

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of the said township of *Brotherton*, in which a similar charge was made on the said undertakers in respect of the same property, assessed at the same annual value of 2000*l.*, against which rate the said undertakers appealed to the then next sessions, which appeal was respited; but before the following sessions, viz. in *Trinity* term 1829, the court of King's Bench ordered that the order of sessions confirming the rate of the 15th *August* 1828 should be quashed, and the said rate amended by an order, of which the following is a copy.

King's Bench.

Wednesday next after three weeks of the *Holy Trinity*, in the tenth year of king *George* the Fourth.

Liberty of <i>St. Peter's, York.</i>	} Upon hearing the counsel
The King	
v.	
The Undertakers of the <i>Aire and Calder Navigation.</i>	} on both sides, it is ordered that an order of sessions made on the appeal of the defendants
against a rate or assessment made for the relief of the poor of the township of <i>Brotherton</i> in the west riding of the county of <i>York</i> , and within the liberty of <i>St. Peter's, York</i> , be quashed for the insufficiency thereof, and that the sessions do amend the said rate by striking out therefrom the assessment made upon the defendants in respect of that part of <i>the river Aire</i> which lies within the said township of <i>Brotherton</i> . And it is further ordered, that the defendants have leave to give a new notice of appeal against the said rate or assessment, and to specify therein, if they think fit, any new ground of appeal against the said rate or assessment.	

At the *July* sessions 1829, the appeal against the

rate of the 27th of *March* 1829 was heard, and that rate was amended by increasing the assessment on the annual value of the rateable property of the said undertakers in the said township from 2000*l.* to 2010*l.* 2*s.* 8*d.*, and an order of sessions was made accordingly, subject to a second case for the opinion of the court of King's Bench. The overseers of the poor of the said township however continued, until the determination of the court of King's Bench on such second case, to make rates for the relief of the poor, in all of which the said undertakers were rated upon property assessed at the annual value of 2010*l.* 2*s.* 8*d.*; and the said undertakers continued to appeal against each of such rates to the quarter sessions. At the *January* sessions 1830, the appeal against the rate of *August* 1828 was respited to the next sessions, no notice having been given to the sessions of the order of the King's Bench of *Trinity*-term 1829 hereinbefore mentioned. No further notice of that appeal appears in the records of the sessions, nor any other respite thereof during 1830, 1831, nor until the *Easter* sessions 1832. At *Easter* sessions 1832, the rate of the 15th *August* 1828, and all the subsequent rates, were amended by reducing the annual value of the rateable property of the said undertakers in the said township to 15*l.* 16*s.* Upon such reductions the amount of all the before-mentioned rates, payable by the said undertakers to the overseers of *Brotherton*, was 12*l.* 0*s.* 6*d.* only. The said undertakers made no application at the *July* sessions 1832 for any order directing the overseers of the township of *Brotherton* to refund to the said undertakers the sum of money so paid to the said defendant as aforesaid, deducting the said sum of 12*l.* 0*s.* 6*d.*, nor was any entry made, nor any proceeding had respecting the said rate; but on the 12th *October* 1832, the following notice was served on the defendant.

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" To the Churchwardens and Overseers of the Poor of the township of *Brotherton*, in the liberty of *St. Peter of York*, in the West Riding of the county of *York*, and every of them, and especially to *Edward Watson* and *Walker Smith* and to each of them.


" As the solicitor and law agent, and on behalf of the undertakers of the navigation of the rivers *Aire* and *Calder*, in the west riding of the county of *York*, I hereby demand of you to repay and return to the said undertakers the sum of money which was paid to you by the said undertakers, or their agent, on or about the 15th day of *December* 1828, as the amount of a certain rate or assessment bearing date the 15th day of *August* 1828, for and towards the necessary relief of the poor of the said township of *Brotherton*, rated and assessed upon the said undertakers as owners and occupiers of a cut or canal, and that part of the river *Aire* within the township of *Brotherton*, dams, locks, and weirs, and tolls, dues or rates, and the costs, charges, and expenses of putting into execution of a warrant of distress for the same rate, bearing date on or about the 22d day *November* 1828, under the hands and seals of *Henry John Dickins* esq. and *Danson Richardson Currer*, clerk, two of his majesty's justices of the peace in and for the said liberty, after deducting thereout such sum and sums of money as are due from the said undertakers for the rates or assessments rated and assessed upon them in respect of their property in the said township of *Brotherton*, and which have been amended and reduced by the general quarter sessions in and for the said liberty, in pursuance of the order and direction of his majesty's court of King's Bench in that behalf; and also take notice, that in case you shall refuse or neglect to pay the same to me, or to Mr. *Joseph Priestley*, at the office of the said undertakers in

Wakefield, within six days from the service hereof, an application will be made to the next general quarter sessions of the peace to be holden for and in the said liberty on the 20th day of *October* instant, as soon as counsel can be heard, for an order of the said court to be made upon you, the churchwardens and overseers of the poor of the said township of *Brotherton*, to repay and return to the said undertakers all such sum and sums of money as they ought not to have paid or been charged with ; and also to pay to the said undertakers, or their said agent, all costs, charges, and expenses occasioned by their having paid, and having been required to pay the said sum of money so wrongfully charged upon them as aforesaid, in respect of the said rate or assessment above-mentioned. Dated 11th *October* 1832. *Samuel Hailstone.*"

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The said undertakers accordingly made an application at the following *October* sessions 1832, for an order directing the overseers of the said township of *Brotherton* to refund to the said undertakers the said sum of money so paid to the said defendant as aforesaid, deducting therefrom such sum as was due according to the said amended rates ; which application was refused by the justices at the said sessions. In the years 1826 and 1827, and from thence to the time of the distress, between two and three pounds, but never more than five pounds a year, had been collected for poor rates from the said undertakers by the overseers of *Brotherton*, but no rate books were produced at the trial previous to *Aug.* 1828. The defendant *Watson* was one of the overseers of the poor of *Brotherton* for the years 1828, 1829, 1830, 1831, and 1832 respectively, but with different coadjutors in each of these years. The township of *Brotherton*, long before and since *August* 1828, adopted the provisions and complied with the requi-

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sites of 22 *Geo. 3. c. 83.* commonly called *Gilbert's* act, and the said sum of 150*l.*, on the same day that it was received, was paid over by the defendant to *W. Smith*, the guardian of the poor of the township of *Brotherton*, appointed under that act before the rate was made, and who had continued to be so up to the time of his receipt of the money, and was so at the time of the action brought. The money so paid was appropriated by the guardian to the fund for the general relief of the poor of the township, and had been expended before 12th *October* 1832. The question for the opinion of the court is, whether under the above circumstances the plaintiff is entitled to recover the said sum of 163*l.* 3*s.* 3½*d.* or any and what part thereof.

Wightman for the plaintiff. The undertakers of the *Aire* navigation, after deducting 12*l.* 0*s.* 6*d.* the amount of all the amended and reduced rates, are entitled to recover the whole amount for which the verdict was entered, as a payment made under compulsory process, since determined to be illegal: By 41 *Geo. 3. (U.K.) c. 23. s. 2.* the sum at which any person is assessed in a poor-rate may be levied and recovered by distress, notwithstanding the person assessed shall have given notice of appeal against such rate for any cause whatever, provided that if any person assessed in any poor-rate shall give the churchwardens and overseers the notice of appeal mentioned in the act; then after the giving such notice, and till the appeal shall be heard and determined, "no proceedings shall be commenced or carried on to recover any greater sum from such person than that at which he or any occupier of the same premises shall have been rated or assessed in the last *effective* rate which shall have been collected in such parish," &c. The object of the section being to

prevent injury to the poor in the interval during which an appeal against a rate is pending, overseers are pro re natâ enabled to levy the amount of the assessment appealed against, provided it does not exceed the previous rate. But if that rate be ordered by the King's Bench to be amended by reducing it, the parish officers must be bound to refund the surplus to the rate payer. It is immaterial what the amount of the last effective rate was, for the enactment cited only applies to the intermediate time during which the rate is sub judice.


[Lord *Lyndhurst* C.B. Why not apply to the right quarter sessions pointed out by sect. 8 of 41 *Geo. 3.* (U. K.) c. 23. to have the money returned? Upon that section the court of King's Bench has held, that the application for an order to refund must be made to the same sessions which heard the appeal, or at least to that sessions which ordered the rate to be lowered. The case states that on the day when the sum now sought to be recovered was received, the defendant paid it over to the guardian of the poor, and that it was applied to the purposes of the poor rate before 12th Oct. 1832. The particular mode pointed out by the statute to obtain the return of the surplus payment made at the proper time, and from the proper individual, has not been pursued. *Alderson* B. The court of King's Bench had no authority to reduce the rate. It must be taken that they sent it back to the sessions with a recommendation to amend it by reducing it (a). It was a capital error to suffer more than the last effective rate to be distrained for, without appealing from the distress (b). *Parke* B. The money was taken from

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(a) See 4 B. & Adol. 343.

(b) See 17 *Geo. 3.* c. 38. s. 7. and 41 *Geo. 3.* (U. K.) c. 23. s. 2. So on plaint the sheriff must have replevied the goods; *Sabourin v. Marshall and others*, 3 B. & Adol. 404.

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the plaintiff by a seizure of goods by this defendant, which was lawful at the time, and was paid over to the guardian of the poor in a manner which, before the reduction of the rate, was perfectly legal. The giving notice to the defendant to hold the money on account of the plaintiff does not prevent the law from operating. The guardian of the poor to whom the money was paid by the defendant had no right to retain it. Then at what moment did this sum constitute so much money had and received by this defendant to the use of the plaintiff?]

An appeal against the rate was made in time but quashed, and the rate was confirmed by the sessions (a). If the sessions had made an order to refund under sect. 8. it must have been directed to the overseers of the poor, of whom the defendant has always been one, and not to the guardian. It was sufficient for the plaintiff to show that more than 2*l.* a year had never been paid, in order to throw it on the defendant to show that he had not levied more in amount than the last effective rate. *Feltham v. Terry* (b) and *Watkins v. Hewlett* (c) prove that money had and received will lie against overseers of the poor to recover money in their hands which was levied on a conviction since quashed, or the surplus of a sum paid to them for the future support of a bastard child which has since died.


Per Curiam (30th April).—It does not appear that the defendant had any such notice that the navigation company had appealed against the rate, as is required by sect. 2 of the act. Then unless the overseers were by law obliged to be satisfied with less, which would have been the case had such a notice been proved, the

(a) See *Rex v. Undertakers of Aire and Calder Navigation*, 4 B. & Cr. 820.

(b) *E. 13 Geo. 3.* (B. R.) cited Cowp. 419. and 1 T. R. 387.

(c) 1 Br. & B. 1. See 2 M. & R. 11.

overseers were entitled to levy the whole amount of the assessment of *August 28th*, and were then compelled by *Gilbert's act*, 22 Geo. 3. c. 83. ss. 7 & 8 (a), to pay it over to the guardians of the poor. The appeal might have been entered with or without the notice thereof to the overseers provided by the act; then this court is not to be left to conjecture that such notice was given (b). This defendant not being therefore shown to be a wrong-doer the action must fail.

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Judgment for the defendant.

Bliss was to have argued for the defendant (c).

(a) See 41 Geo. 3. c. 9. s. 2.

(b) The report in 4 Bar. & Adol. 342. states, that the appeal against the rate was entered at the *October sessions 1828*, and respited to the *January sessions 1829*, but that the overseers of *Brotherton* had no notice in writing of the entry and respite.

(c) The points set down for defendant were—First, The money was paid to him as overseer of the township of *Brotherton*, and by him immediately paid over to the guardian of the poor of that township, pursuant to stat. 22 Geo. 3. c. 83. ss. 7 & 8. Secondly, that it did not appear that the distress in the case was illegal. (See stat. 41 Geo. 3. c. 23. ss. 1. 2. 3. 4. and 8.) Thirdly, that the plaintiff had neither proved a demand of the perusal, and copy of the warrant of distress, nor that the action was commenced within six months after the act committed, pursuant to the stat. 24 Geo. 2. c. 44. ss. 6 and 8.

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DIBBEN *against* Marquess of ANGLESEA.MARQUESS OF ANGLESEA *against* DIBBEN.SAME *against* PEYTON, DIBBEN, and LILL.

THE first of these actions was in case for disturbance of various rights of common, pannage, &c. in *Hanley* common and woods, by erecting fences, &c. In two actions, one on the case for disturbance of common, by inclosing a part, and the other in trespass *quare clausum fregit*, a verdict was taken generally for the plaintiff, subject to a reference by order of *mis prius* of those causes, and of another action of trespass not then at issue, as well as of all antecedent causes of action between the parties: *H.* a person as whose servants the defendants had justified in some of these pleas, and who was not a party to either cause, was to be at liberty to become a party to this reference, as was any other person claiming right of common over the locus in quo; the object of the reference being declared to be that the rights of the commoners should be ascertained, secured, and regulated as concerned the parties thereto. In one action of trespass not guilty was pleaded, and a great number of issues were joined, claiming various rights of common. In the other, not guilty, and numerous special pleas of justification had been pleaded, though no issues were joined at the time of the reference. The arbitrator awarded for the plaintiff in the action for disturbance of common. In the action of trespass which was at issue, he awarded that the defendants were not guilty of the trespasses; and in that which was not at issue, he awarded that the plaintiff had no cause of action against the defendants. He did not further notice the other issues, or specify any mode of terminating either cause; but proceeded, in pursuance of the terms of the order of reference, to declare in his award the rights of the parties in the causes to enjoy the common, and inclose certain woods in future. He then directed the party who was the defendant in the first action, and plaintiff in the two others, to pay all the costs attending the reference and award. It was moved, first, to set aside the award as not final, in not having with certainty disposed of all the matters referred: secondly, to enter a verdict for the plaintiff on all the issues joined in one of the actions of trespass, except on that joined on the plea of not guilty: and, thirdly, to enter a verdict in the manner directed by the arbitrator on the facts stated by him for the opinion of the court. Held, first, that the award was final, and substantially disposed of all questions between the parties: secondly, that as the arbitrator had not been requested at the hearing of the reference to decide on each issue separately, or on those in particular which justified under title in *H.*, who had not become a party to the reference, he was not bound to find any thing respecting *H.*, and that the officer of the court might make up the roll, as if the causes had been tried by a jury who had been discharged from trying the special issues.

The arbitrator stated the following facts for the opinion of the court, awarding the verdict to be entered according to the decision. A manor with the lands and woods over which common was claimed, had been from time immemorial parcel of *Crambourne Chase*. In 17 *Eliz.* the lord being owner of certain coppices and woods in the manor, granted several leases for a thousand years, of messuages and lands, with common of pasture as appurtenant thereto, for beasts, over such coppices and woods, in the manner then accustomed by others having like common. The right of common then accustomed was from 12th *May* to 22d *Nov.* except in those parts of the woods wherein the owner from time to time cut down the wood or underwood at his pleasure, and which he was accustomed to inclose with a fence to preserve the young growth, excluding the deer of the chase for three years, and

In the third count common of pasture was claimed on *Hanley* common for two rother beasts levant &c. every year and at all times of the year, as appurtenant to plaintiff's messuage and land in *Hanley*. The fourth count claimed like common for one rother beast and two sheep. The ninth claimed like common in *Hanley* woods for one rother beast. The tenth claimed like common there from 12th *May* to 22d *November* every year. The fifteenth claimed common of pasture for one rother beast in *Woodcott* common. The second and last actions were in trespass for breaking and entering certain coppices of the Marquess of *Anglesea*, and breaking fences, whereby cattle got in and damaged the trees. In the first action the plea was not guilty. In the other two the general issue was pleaded (before the new rules), with a great number of special pleas of justification, claiming several rights of common and pannage over the places in question, called *Hanley* commons and woods. Issues having been joined by the plaintiff, the three causes, and "all antecedent causes of action between the marquess and the said other parties or any of them," were afterwards referred to a serjeant at law by order of nisi prius, a verdict being first entered for the plaintiff in the two first actions, subject to his direction whether they should stand, and if so, for what damages; or whether a ver-

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all commonable cattle for four years, after each cutting. This right was enjoyed by the grantees till the disturbance complained of. The question was, whether the owner of the woods could legally inclose any part of them where the wood had been cut down, so as to keep out all commonable cattle for seven years after each cutting? Held that he could not, on two grounds: first, that stat. 22 *Ed.* 4. c. 7. does not apply to woods wherein rights of common exist; and secondly, that 35 *Hen.* 8. c. 17. s. 8. only extends to woods in which there exists immemorial right of common, in which case it provides means by which the space where wood is intended to be cut may be inclosed and kept in severalty for seven years.

Where by an order of reference the costs of the causes referred were to abide the event of them, and in one, which was not at issue, the arbitrator found that the plaintiff had no cause of action against the defendants:—Held, that the costs of the pleadings followed the event of the cause, as in case of a nonsuit.

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dict should be found for the defendants, or a nonsuit entered. The third cause had only advanced to the pleas. The arbitrator was also to take *Old May-day* to be the 12th *May*, and to regulate what day should be intended by *Old May-day* in future. It was also ordered that the arbitrator should ascertain the rights of common, and all other rights of the parties to the reference, in relation to the premises referred to in the pleadings in the causes, and to which part or parts of them such rights, or any of them, extended; and also that the costs of the respective causes to be taxed, and of so much of the reference as might relate to the said causes, should abide the event of the said causes respectively, and the residue of the costs of the reference, and also the costs of the special juries, should be in the discretion of the arbitrator, who was to direct to and by whom and in what manner the same should be paid. *J. Hardiman* and any other person having, or claiming to have, rights of common, or any other rights on the commons or woods referred to in the pleadings, were to be at liberty to become parties to the reference; but such parties, or any of them, were thereby to become subject or liable to the costs of the causes, or any of them, the parties to this reference consenting that the award to be made under the same may be made the basis of an act of parliament declaring the rights and regulating the enjoyment thereof, the parties *Dibben*, *Lill* and *Peyton* not to be chargeable with any expense relating to such act, the object of the reference being declared to be that the rights of the commoners and the extent of the coppices should be ascertained, secured, and regulated as concerned the parties thereto; and therefore it was agreed, that no technical variance in the statement of the number of the cattle, in respect of which the rights set forth in the declaration were claimed, or other technical variance, matter, or objection

which could prevent a decision of the causes on the merits, should be taken or allowed. Power was then given to the arbitrator to amend the pleadings, and to state special facts for the opinion of the court, at the request of either party, or at the like request to set out on the award any question of law which might arise.

In *Dibben v. The Marquess of Anglesea* he awarded that the plaintiff had just cause of action for the matters in the third, fourth, ninth, tenth, and fifteenth counts, and assessed the damages therein at 15*l.*; directing a verdict for plaintiff "accordingly," and for the defendant on the other counts. In the *Marquess of Anglesea v. Dibben and Lill* he awarded that the defendants were not guilty of the trespasses mentioned in the declaration, and ordered a verdict to be entered for them accordingly. In *Marquess of Anglesea v. Peyton and others*, he awarded that the plaintiff had no cause of action against the defendants for the matters in the declaration in that cause mentioned. He took no notice of the other issues in either cause, nor did he further specify any mode for terminating either of them; but proceeded to award that the Marquess of *Anglesea* was seised of and entitled to the manor of *Hanley*, in the county of *Dorset*; and was also seised of and entitled to the soil and freehold of and in the said several coppices in the declaration in the said cause of the said marquess against *Dibben* and *Lill* mentioned; and also of and in certain other coppices, situate in the said manor and parish of *Hanley*, and named in the award; and in two coppices called *B.*, being part of the coppices or woods situate in the said manor of *Hanley*, called *Hanley Woods*, and in the said parish of *Hanley*, and referred to in the said action of *Dibben v. Marquess of Anglesea*; and also of and in the said commons in the declaration in that cause mentioned,

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situate in the manor and parish of *Hanley*, called *Hanley and Woodcott's Commons*; and he further awarded and adjudged that the said marquess, and all others who may be the owners or occupiers of the said woods or coppices might, at his or their free will and pleasure, from time to time cut down the same or any part thereof, and might inclose the same or such part so cut down, and exclude all manner of cattle and beasts, commonable or otherwise, therefrom, for the space of four successive years then next after, for the preservation of the growth of the wood and underwood thereon. The arbitrator then awarded that *Dibben*, and all those &c., had right of common of pasture in, upon, and throughout *Hanley and Woodcott Commons*, for six rother beasts and two runners or two yearling calves, and sixty-three sheep, at all times of the year, and also common of pasture in the said coppices or woods every year for the same rother beasts and runners, except when the same, or any part thereof, shall be cut or inclosed, as after in his award mentioned, from 12th *May* to 22d *November*, both days inclusive. He then awarded that *Dibben* had no other rights in the said commons and woods, except the use of the public ways; and that *Lill* had no right of common or other right therein, except the use of the public rights of way. He further awarded, that *Peyton* and all those whose estate he now hath of and in a certain messuage, land, and premises now in his occupation in *Hanley &c.*, containing &c., had of right common of pasture in, upon, and throughout *Hanley and Woodcott commons* for all his rother beasts and pigs, the pigs being ringed, levant &c. in, upon, and throughout the said coppices and woods of the marquess every year, except when the same, or any part thereof, shall be cut and inclosed, as hereinbefore mentioned, from 12th *May* to 22d *November*, both days inclusive; and

also to take reasonable estovers of the furze and fern growing on the said commons, and carry the same to the said messuage with the appurtenances to be spent herein and consumed for necessary fuel thereon every year, at all reasonable times of the year, at his free will and pleasure, as appurtenant to his messuage; and that *Peyton* was entitled to no other right in the said woods or commons, except the use of the public ways therein. After providing power for the marquess and owners &c. of the coppices to amend and renew the bank and fence there lately made round the same, and that the commons named shall extend up to that fence (wherever they shall adjoin it), and no further, he awarded, that the marquess do and shall leave open on each side of each coppice or wood which shall be so inclosed, except as hereinbefore mentioned, in respect of the coppices or woods inclosed after the same shall have been cut, at least two unobstructed ways, at convenient distances, for ingress and egress to and from the same, to be left open from 23d *November* to the 11th *May* (both days inclusive) in each year.

The arbitrator then stated the following facts:—The parish and manor of *Hanley*, and all the messuages, lands, and tenements before mentioned, were, from time whereof the memory of man is not to the contrary, within *Cranbourne Chase*, and so continued until the said chase, by an act of parliament passed in 9 G. 4. (a), in manner and for the considerations therein mentioned, and the award which was duly made and published in pursuance of the said act of parliament, was disfranchised, and which said act of parliament and award were produced in evidence before me, and to which I do award that the court may be referred; and further, that in the 17th year of the reign of Queen

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(a) 9 G. 4. c. 14. private act.

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Elizabeth, the Right Hon. Sir *John Paulet* kn., Earl of *Wiltshire* and Marquess of *Wiltshire*, then lord of the manor of *Hanley*, and owner of the said coppices and woods, and whose estate therein the said Marquess of *Anglesea* now hath, made and granted several leases of the same respective messuages, lands, and tenements, now held and occupied by the said *H. Dibben* and *J. S. Peyton* respectively, for the term of 1000 years respectively thence next ensuing ; and in each of the said leases were granted and demised common of pasture, as appurtenant to the said premises, messuages, and lands respectively, for certain rother beasts, in, over, and upon the said woods and coppices, to be used and enjoyed in the manner then accustomed by others having common of pasture in, over, and upon the same woods and coppices for the like commonable cattle. And further, that the said persons were then accustomed to have and enjoy common of pasture for the like commonable cattle, in, upon, and over the said woods and coppices every year, in and upon the said 12th day of *May*, and from thence until the 22d day of *November* then next following, except only such parts of the said woods wherein the owner or occupier thereof from time to time, at his free will and pleasure, cut down the said wood and underwood there growing; which part or parts thereof so cut down, the said owner or occupier was accustomed to inclose with a fence to preserve the growth of the wood and underwood therein, and thereby excluded all beasts and cattle therefrom, until the end of three successive years from the time of such cutting as aforesaid, when the deer of the said chase were admitted into such coppices and woods, and all other cattle and beasts were excluded therefrom, until the end of four successive years from the time of such cutting as aforesaid, when the said commonable cattle were admitted at the same time and for

the same periods as before the said coppices and woods were cut as aforesaid. And further, that from the time of such leases being so granted hitherto, the said lessees and assignees, their farmers, tenants, and occupiers of the said premises respectively, have used and enjoyed the said common of pasture in the said woods and coppices in like manner. And in case any of the superior courts of law at *Westminster*, wherein the said question of law shall be hereupon raised, shall decide that upon the said facts and evidence hereinbefore stated, that the said marquess is entitled to inclose the said coppices and woods so from time to time to be cut down as aforesaid, and exclude therefrom all the said cattle and beasts for the space of seven successive years, then I award &c. that the said marquess, and all others who shall be owners or occupiers of the said woods and coppices, may, at his and their free will and pleasure, from time to time, when the same or any part thereof shall be so cut down by him or them as aforesaid, inclose the same or such part thereof, for the space of seven successive years, for the preservation of the said wood and underwood; and may during the seven years exclude all manner of beasts and cattle therefrom, instead of for the space of four years hereinbefore mentioned. And in case the said court shall decide that upon the said facts and evidence the said marquess is entitled to inclose the said coppices or woods so from time to time to be cut down as aforesaid, in case the said woods and coppices should be under the age of fourteen years at the time of their being so cut down as aforesaid, and exclude all cattle and beasts for the term of five years, and all cattle except calves and yearling colts for the term of six years; and if the said woods or coppices shall be above the age of fourteen years at the time of such cutting, then to inclose the same and exclude all cattle and

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beasts therefrom for the term of eight years : then, and in that case, I do award, order, direct, and determine, that the said marquess and all others the owners and occupiers of the said woods and coppices, may, at his free will and pleasure, inclose such and such parts of the said woods and coppices so from time to time to be cut down as aforesaid, and exclude all beasts and cattle therefrom, if the same shall be under the age of fourteen years at the time of such cutting, for the space of five years ; and all beasts and cattle except calves and yearling colts for the space of six years ; and if such or such parts of the said woods and coppices so to be cut down as aforesaid be above the age of fourteen years, then that he the said Marquess of *Anglesea*, and all others the owners and occupiers thereof, may, at his and their free will and pleasure, inclose the same so cut down as aforesaid, and exclude all beasts and cattle therefrom for the space of eight years ; and in case the said court shall decide that the said marquess is entitled to inclose such or such parts of the said woods or coppices from time to time cut down as aforesaid, for a longer space of time than five years after such respective cutting, and that the said plaintiff, in the said action brought by the said *Henry Dibben* against the said marquess, is therefore not entitled to a verdict upon the ninth and tenth counts of the declaration in the said last-mentioned action : then I do award &c. that a verdict be entered for the defendant instead of the said plaintiff upon the ninth and tenth counts of the said declaration, as hereinbefore mentioned. And I do award that the damages of the said plaintiff in the said last-mentioned action do amount to the sum of one shilling, and that the verdict be entered accordingly. And I do further award that the said marquess do and shall pay and bear the costs of the special juries in

the said causes, and all costs of and attending this reference and award not relating to the said causes.

In *Michaelmas* term 1833, *Barstow* for the Marquess of Anglesea moved to set aside the award, on the ground that it was not final, not having disposed of the matters referred in *Marquess of Anglesea v. Dibben and another*, or in *Same v. Peyton and others*. Secondly, if it was held final, he then moved to enter all those issues for the marquess in the first and second actions, which were not noticed by the arbitrator. Thirdly, he objected that no judgment could be entered on the roll, as the arbitrator had not ordered any entry to be made of a discharge of the jury as to the issues on the special pleas. He did not however admit that the arbitrator had power to order such an entry to be made.

The affidavit in support of the motion stated, that in many of the pleas in the said actions in which the marquess was plaintiff, the defendants justified the alleged trespasses under the authority of *J. Hardiman*, who was alleged to be entitled to various rights of common over the coppices and commons mentioned in the declarations; and that on the sixth day of the said reference, the counsel for the defendants in those two actions, produced as evidence of such rights, certain indentures of lease and release, dated 24th and 25th September 1700, which were alleged to have been found among the deeds of the said *J. Hardiman*; but did not otherwise in any way attempt to prove that the premises or the rights of common conveyed by the said indentures had become vested in the said *J. Hardiman*. That, with this exception, the case of the defendants in those actions was closed without giving any other title-deeds in evidence, in the hope, as the said defendant believed, that the parol evidence given of right of common of pasture would be deemed

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sufficient by the arbitrator to establish a claim of common of pasture for all their commonable cattle levant et couchant on their respective messuages ; and that, in consequence, the case and evidence on the part of the marquess were next wholly gone through on the supposition and understanding that the right set up by the said defendants was intended to rest entirely on levancy and couchancy, and that no more deeds were to be given in evidence : that it was not until the ninth day of reference, when the marquess's case and evidence were closed, that the counsel for the defendants produced another deed belonging to *Dibben*, by which certain rights of common for a limited number of cattle and sheep were conveyed ; and that all three defendants then entered into further parol testimony, at the conclusion of which their counsel offered to produce, and in consequence of the observations of the arbitrator, did produce various title-deeds and documents of *Dibben* and *Lill*, by which certain limited rights of common were granted, which were alleged to have become vested in them respectively ; and also produced other papers called evidences of title of *Peyton*, the production and proof of which deeds and papers occupied the greater part of the next day, being the tenth of the reference : that the fact of the trespasses which are the subject of the said actions in which the said Marquess of *Anglesea* was plaintiff having been committed by the said *Dibben* was abundantly proved in evidence, and was admitted by his counsel in his reply ; but that many witnesses were called for the exclusive purpose of endeavouring to prove that *Peyton* and *Lill* had not participated in them so as to render them jointly liable with the said *Dibben* : that an extract of the award made by *P. W.* the commissioner appointed under the act for dis-

franchising *Cranbourne Chase* (9 Geo. 4. c. 14. Pr.) on the 29th September 1829, was given in evidence before the said arbitrator, whereby, after reciting that *George Lord Rivers* had died after the passing of the said act, and had given or devised the annual rents or sums of money charged, as by the said act is directed, to be charged upon any lands lying within the limits of the said chase, together with all powers and remedies for recovering the same rents, and the full benefit and advantage thereof; and also all such lands as should or might be set out by way of satisfaction and compensation of such rent and rents unto certain persons therein named, and their heirs, to certain uses; and the said *P. W.* did award and direct that the several and respective annual rents or sums mentioned and specified or set forth in the schedule hereinafter set forth, amounting in the whole to the yearly sum of 1800*l.* should be for ever respectively issuing and payable to the said devisees, their heirs and assigns, or to the person or persons for the time being entitled to the said estate so devised by the said *George Lord Rivers*, from and out of such of the respective lands within the limits of the said chase, being respectively of adequate value, as were mentioned and specified in the schedule hereinafter set forth.

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| No.              | Owner.                                                            | Occupier.          | Situation. | No.<br>on<br>Map.              | Premises.                                                                                   | Proportion<br>of actual<br>Rent<br>Charge. | Rate per<br>Acre at<br>which the<br>Lands are<br>charged. |
|------------------|-------------------------------------------------------------------|--------------------|------------|--------------------------------|---------------------------------------------------------------------------------------------|--------------------------------------------|-----------------------------------------------------------|
| Map<br>c.<br>19. | The Most<br>Noble Henry<br>William,<br>Marquess<br>of<br>Anglesa. | Benjamin<br>Biles. | Handley.   | 1<br>2<br>3<br>4<br>&c.<br>&c. | In this<br>column are<br>set forth<br>the full<br>particulars<br>of <i>Biles's</i><br>Farm. | £. s. d.<br>139 3 0                        | £. s. d.<br>0 4 9                                         |

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That for the purposes of the said reference, the fact was admitted by the counsel for *Peyton, Dibben, Lill, and Hardiman*, that neither of those parties were charged with any part of the said rent-charge of 1800*l*. Some letters from the defendant *Dibben* were then set forth stating the committing of the trespasses by him.

In the affidavit filed in answer to the rule, it was stated that parol evidence was given before the said arbitrator, showing the exercise of rights of common by the said *J. Hardiman*, and of those from which he derived his title to the premises in respect of which such rights were claimed in the pleadings in the said actions in which the said marquess was plaintiff; and that all the trespasses in the said action secondly above mentioned, were alleged in the declaration in that action to have been committed in five named coppices respectively; and that it was clearly proved before the said arbitrator, that the said five closes adjoined *Hanley* common, and that there has always been a certain belt or border, varying in width from about fifteen to twenty feet and upwards, extending nearly round the said common (a); and that it was proved by the witnesses on behalf of the said *Dibben* and *Lill*, that the said belt or border formed no part of the said closes, or any of them, but was part of *Hanley* common; and also that a certain mound and fence, erected by the said marquess in the beginning of 1831, was erected, not on the said five closes or any of them, nor much of it, if any at all, on the said belt or border, but upon certain other parts of the said common, near to the said belt or border; and that it was stated by witnesses called on the part of the said marquess, that they considered the said belt or border as forming part of the said five closes respectively, and that the greater part of the said mound and fence was erected upon the said belt or border: that the trespasses alleged in the declaration in the

(a) See *Stanley v. White*, 14 East, 332.

cause secondly above-mentioned were no otherwise proved and admitted than by proof and admission that the said *Dibben* had made gaps in the said mound and fence for the express and avowed purpose of asserting the rights of himself and of other persons claiming rights of common, the exercise of which was wholly obstructed and prevented by the said mound and fence, and which mound and fence had been erected for the avowed purpose of obstructing and preventing the exercise of such rights of common.

On the part of the marquess, it was contended before the arbitrator, that the belt or border above-mentioned formed part of the coppices which it adjoined ; and on the other side it was contended, that this belt or border formed part of *Hanley* common, which it also adjoined, and much conflicting evidence was given upon the question.

The Court granted a rule to show cause why the award made in pursuance of the order of *nisi prius* should not be set aside, on the grounds that the same was not certain or final, and that it did not dispose of all the matters referred to the arbitrator ; or why, in *The Marquess of Anglesea v. Dibben and another*, a verdict should not be entered for the plaintiff on all the issues except that arising out of the plea of "not guilty" to the declaration ; and why, in *Dibben v. Marquess of Anglesea*, a verdict should not be entered for the defendant on the ninth and tenth counts of the declaration, and the verdict for the plaintiff entered on the third, fourth, and fifteenth counts only, and for nominal damages, and why the said verdicts should not be set aside. The court also ordered the rule with the preceding affidavits to be put in the special paper for argument, and that in the meantime proceedings be stayed. In this term

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*Barstow* for the Marquess of Anglesea was called on to state his reasons for setting aside the award. The award is not final or certain, for the arbitrator has not disposed of all the issues in the action against *Dibben* and *Lill*, or in that against them and *Peyton*. In the latter, the award that the plaintiff had no cause of action, may be either because the plaintiff did not prove the trespasses laid, or because the defendant established some one of the justifications. The defendants in both these actions, after alternately justifying on their own rights, set up a fourth title in *Hardiman* (a), justifying as his servants in several pleas to the new assignments. They also produced his documentary title before the arbitrator, though he had not become party to the reference pursuant to its terms, so as to be bound by it. Now by the order of nisi prius, the three causes were referred, with every antecedent matter in difference; and it was most important for all parties that every issue in each cause should be disposed of, not only by ascertaining the rights of *Dibben*, *Lill*, and *Peyton*; but also those of *Hardiman*, so far as to estop the three defendants or their successors from setting up his rights against the owners of the woods, further than settled by the verdict awarded in these causes. For *Outram v. Morewood* (b) shows, that if a verdict had been found on the issues setting up *Hardiman*'s title, it might be pleaded by way of estoppel in any other action between the same parties or their privies in respect of the same fact or title; whereas, as the award stands, *Dibben*, *Lill*, or *Peyton* may yet, under *Hardiman*, justify similar acts against the owners of the woods. On the other hand, had the award been made on these issues, finding a right in

(a) *Hardiman* was afterwards stated to be owner of other premises in *Hanley* not belonging to *Dibben*, *Lill*, or *Peyton*.

(b) 3 East, 346.

*Hardiman*, he might have produced it in evidence against such owners; *Hancock v. Welsh and Cooper* (a). The importance of the decision of all the issues to the parties being shown, it is contended that they had a right to have them all decided, whether tried by a jury or an arbitrator.

[Lord *Lyndhurst* C. B. *Primâ facie* it seems that if these causes had been tried at *nisi prius*, and verdicts had been found for the defendants on the pleas of not guilty, that finding would have disposed of the special issues. It is now said that a jury would have been compellable to try each of them, and that the arbitrator who did not do the same, failed in his duty. In *Cossey v. Diggon* (b) there was an avowry for rent, to which the pleas in bar were *non tenuit* and *riens in arrear*. The first plea was found for the plaintiff, and it was held that the second became thereby immaterial, and that the proper course at *nisi prius* would have been to discharge the jury from finding any verdict on it. But as no verdict at all had been entered on the record, the court said they had at present no jurisdiction, and suggested an application to the judge to direct in what manner it should be entered. It was afterwards entered for the plaintiff.]

The general issue is unimportant while the special pleas raise questions of right, of each of which it was the sole object of the submission to procure a settlement. The jury are summoned to try every issue without distinction. Can a judge discharge a jury from trying any issue which is in his opinion rendered immaterial by the finding on any other issue? In *Powell and others v. Sonnett and others* (c), in error in the Ex-

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(a) 1 Stark. C. N. P. 347; and see *Kinnersley v. Orpe*, Doug. 517.

(b) 2 B. & Ald. 546; see 5 T. R. 248, 3 B. & P. 348.

(c) 3 Bing. 381, as to discharge of jury by operation of law from finding immaterial issue.

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chequer Chamber, the record stated a verdict for plaintiffs on twelve counts, and a discharge of the jury on eight others, without adding that it took place by consent of parties. The judgment for the plaintiff was affirmed notwithstanding that omission, the court inferring *omnia rite esse acta*, as no bill of exceptions or motion in arrest of judgment &c. appeared on the record. That case however shows that such consent was a necessary requisite, and therefore inferred under those circumstances. [Lord *Lyndhurst* C. B. The court was there only called on to decide on a case where no such objection appeared on the record.] The plaintiff's failure to make out a *prima facie* case would not authorize a judge to discharge the jury from trying, at the defendants' instance, other issues on the record of importance to them and their successors. Had it been suggested that *Hardiman's* title became immaterial from his not becoming a party to the reference, it might have been urged that it was most important to ascertain it.

Lastly, how can the judgment be entered up? for the arbitrator has not ordered any entry of a discharge of the jury as to the issues on the special pleas; and no damages being ascertained, no costs can be taxed. In *Norris v. Daniel* (a) the costs of an action and of an award were to abide the "event" of the award. The arbitrators found that plaintiff had a "good cause of action" on five out of eight counts, without taking notice of the other three, and awarded that defendant should pay 5*l.* damages, and that no further proceedings should be had in the action. It was held, that as there was no award as to three counts, and no "event" to authorize the officer to tax costs on them, no part of the award could stand. In that case it was plain that the

(a) 9 Bing. 507. See *In re Leeming*, 5 B. & Adol. 405; *Thornton v. Hornby*, 8 Bing. 13; and *Eardley v. Steer*, Exch. 16th June 1835, (MS.)

defendants were entitled to judgment on some of the issues, but were precluded from obtaining their costs on them by the form of the award. *Wykes v. Shipton and another* (a) was an action of trespass, in which the general issue and a justification were pleaded. Replication, de injuriâ, with a new assignment. Judgment by default on the latter. The arbitrator to whom it was referred awarded a verdict for defendant, without giving damages on the new assignment. On objection that on that account the award was not final, and it being argued that till damages are found the court could not give judgment on the whole case, the award was set aside. Supposing the award is treated as valid, the verdict should be entered against *Lill* on all the issues.

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On the special facts stated by the arbitrator for the opinion of the court, *Barstow* contended that in *Dibben v. Marquess of Anglesea* the verdict should be entered for the plaintiff on the third, fourth, and fifteenth counts only, and for the defendant upon the ninth and tenth counts of the declaration, with reduction of damages to one shilling, pursuant to the terms of the award. For, first, by stat. 22 *Edw.* 4. c. 7., the marquess was entitled, as owner of the woods in the chase, to keep out commonable cattle for seven years, whatever might be the period of the growth of the wood; and, secondly, by the statutes 35 *Hen.* 8. c. 16., and 14 *Eliz.* c. 25., he was entitled, as such owner, to keep out commonable cattle for the different times pointed out by those statutes, with reference to the growth of the wood; but for not less than seven years from the last cutting of the wood. The opinion at which the court will arrive on these points may govern the entry of the judgment on the issues in the cause of *The Marquess of*

(a) Cited from *T. Peake's MSS.*, K. B. 21st January 1834; 12 L. J. 91.

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*Anglesea v. Dibben and Lill.* On the first point, 22 *Edw.* 4. c. 7. (A. D. 1482-3,) recites, "that divers subjects, having woods growing on their own ground within forests and chases in *England*, or purlieus of the same, have cut their said wood, because they might not before time cope (a) or inclose their said ground to save the young spring of their wood so cut, *any longer time than for three years*, the same young spring hath been in times past, and daily is destroyed with beasts and cattle of the same forest, chases, and purlieus, to the great hindrance &c., and to the likely destruction of the same forests, chases, and purlieus." It then enacts, "that if any subject, having wood of his own growing on his own ground within any forest, chase, &c., shall fell, by licence of the king or his heirs, in his forests, chases, or purlieus, or without licence in the forest &c. of any other person, or make any sale of the same wood; it shall be lawful to the same subjects, owners of the same ground whereon the wood so felled did grow, and to other such persons to whom such wood shall happen to be sold, immediately after the wood so felled, to cope and inclose the same ground with sufficient hedges able to keep out all manner of beasts and cattle forth of the same ground, for the preserving of their young spring; and the same hedges so made may keep continually for seven years next after the same inclosing, and repair and sustain the same as often as shall need within the same seven years." Next, 35 *Hen.* 8. c. 17. (b) enacted by section 5., "that owners of woods or coppice set with great trees above 24 years growth, shall, at the felling or weeding thereof, leave twelve of them per acre to be preserved by them for twenty years next after the felling, and

(a) *Quere*, meaning, embank? See Johnson's Dict. verb. Cop. Copped; and see Tyrwhitt and Tyndale's Digest of the Statutes, tit. Trees, Woods.

(b) Made perpetual by 15 *Eliz.* c. 25. s. 3.

shall, for seven years then next following, sufficiently inclose them or the springs thereof, and otherwise save and preserve from the destruction thereof by any manner of cattle or beasts." Certain penalties are then imposed for not leaving the proper number of trees, and also 3s. 4d. for every rood of such great wood not so inclosed, fenced, saved, or preserved, during the said space of seven years. By section 7., it shall not be lawful for persons having woods or underwood wherein any other justly hath used time out of man's remembrance to have common of pasture, to fell the same till the fourth part of the wood is severed, set out, and sufficiently inclosed in the manner thereby provided. And by section 8., the part so severed, bounded, and set out, after every felling or cutting down of the coppice, woods, or underwoods, for the time being in or upon the same, by authority of the act, shall be sufficiently inclosed and fenced, and the inclosure thereof sufficiently and continually kept, made, repaired, preserved, and maintained, by the space of seven years next after every felling thereof, on the same penalties as in section 5. : and no beasts or cattle during the next seven years shall willingly, by any person or persons, be put in, or shall be suffered to feed or to continue in any parcel of any such part so set forth as aforesaid, during seven years next after the felling thereof, on a penalty of fourpence for every beast put in or wilfully suffered to be put in. The statute 13 *Eliz.* c. 25. s. 18. enacts, that all manner of woods or coppice intended by 35 *Hen.* 8. c. 17. to be inclosed, and the springs thereof preserved, shall be sufficiently inclosed, or the springs thereof otherwise saved from destruction, for two full years more than in 35 *Hen.* 8. c. 17. is limited, according to the age of the woods felled ; and provides, that no cattle shall be put in any coppice woods inclosed, to be preserved from the time

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of sale thereof till the end of five years, nor from the end of five years, any other cattle, but calves and yearling colts only, till the end of six years, if the wood was under the age of fourteen years at the last fall, or until eight years, if the wood was above the age of fourteen years at the last fall, &c. Then the marquess was compelled by statute *Hen. 8.* to keep all commonable cattle out of the felled coppices for seven years after the fall, for that exclusion was intended by the acts, for the public object of preserving timber and wood, by suspending the rights of the commoners(a). The acts therefore apply, though the subsequent grant of the Marquess of *Wiltshire* to the predecessors of *Dibben, Peyton, &c.*, contained no words of exclusion. Nor can 35 *Hen. 8. c. 17.* be called obsolete. By 29 *Geo. 2. c. 36. s. 1.*, reciting that the general provisions of 35 *Hen. 8.* had not been duly put in execution, owners of woods wherein others have common of pasture may, with assent of the majority of commoners, inclose for growth of timber or underwood any part of such woods, for such time and on such conditions as to recompence as shall be agreed. The subsequent acts, 31 *Geo. 2. c. 41.*, and 10 *Geo. 3. c. 42. s. 7.*, regulate the recompence to be paid. The protection of the spot while it remains woodland is all that is here contended for. [Lord *Lyndhurst C. B.* The act 35 *Hen. 8. c. 17.*, which by section 9 imposes certain restrictions on the cutting of woods by the owners, confines those restrictions to cases of commons existing beyond man's remembrance, as in section 7. In so doing, the legislature might have relied that in future grants to be made of commons, arrangements would be made to protect the rights of the owners of woods.] The object of protecting woods from cattle being the same, whether the right of pasture claimed rested on grant or immemorial prescription,

(a) Shepp. Touch. 70.

ought to prevail in either case. Many cases show that what is done against an express statutory provision made for the benefit of the public, cannot be the subject of an action (a). In *Wetherell v. Jones* (b) Lord *Tenterden* says, "Where a contract which a plaintiff seeks to enforce is expressly or by implication forbidden by the statute or common law, no court will lend its assistance to give it effect." As to 22 *Edw.* 4. c. 7., it was questioned in *Barrington's* case (c) whether a commoner was within the meaning of that act. According to *Coke's* report, it was held only to extend to owners of several woods, and not to commoners. But the report in *Godbolt* (d) shows, that though Lord *Coke* and *Foster J.* were of that opinion, *Warburton J.* held that statute 22 *Edw.* 4. did apply to woods in which were rights of common, while *Walmsley J.* rested his judgment on other grounds. The marquess has however a right to stand on 35 *Hen.* 8. and 13 *Eliz.* [*Parke B.* As the statute 22 *Edw.* 4. only gave power to the marquess and his predecessors to inclose for their own benefit, they might renounce that right.]

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*Manning* contra. It is clear that the first cause is disposed of. The next objection is, that from the arbitrator's default in not ascertaining the rights of *Hardiman*, the three defendants in the two last causes may again as his servants commit the acts complained of; but the arbitrator has ascertained all the rights of the parties to the reference, they being the same as on the pleadings.

(a) See *Bensley v. Bignold*, 5 B. & Ald. 335; *Langton v. Hughes*, 1 M. & S. 593; *Law v. Hodgson*, 11 East, 300; *Brown v. Duncan*, 10 B. & Cr. 93; *Little v. Poole*, 9 B. & Cr. 192.

(b) 3 B. & Adol. 225.

(c) 8 Co. Rep. 136. *Chalk v. Peter*, S. C. See Lord *Coke's* preface to the 8th part of his Reports, p. xxxi.

(d) Page 169, nom. *Chalk v. Peter*. S. C. 2 Brownlow, 289.

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*Hardiman's* rights could in no way be adjudicated on by the arbitrator, unless he had become party to the reference according to the liberty left to him to do so. In *Wykes v. Shipton*, the issue on the new assignment not being disposed of by assessing the damages, there were no materials for a judgment of the court. But here the arbitrator, by ascertaining and describing the rights of common, has disposed of all the matters in dispute dehors the causes; and the verdict for the defendants, on not guilty pleaded, made any notice of the other pleas immaterial; for that result would arise from the finding that the acts alleged as trespasses were committed on open common. Suppose that the action of trespass against *Dibben* and *Lill* had been tried, and that the jury had found them not guilty of the trespasses alleged, it would have been absurd to ask them what their finding was on the rights of common set up in the special pleas, on the assumption that the acts of trespass were proved to have been committed. The consent of the parties is not required to the discharge of the jury. If on demurrer to a plea which is a bar to the action, the plea is held good, judgment of nil capiat is entered against the plaintiff, notwithstanding there are other issues in fact (a).

[Lord *Lyndhurst* C. B. If, under such circumstances as these, a judge could not discharge the jury from trying the remaining issues, a party might try his rights without any actual infringement of them having occurred. But that would not be suffered. The judgment in *Cossey v. Diggon* (b) imports, that had a verdict been entered on the issue of non tenuit, the court would have entered a verdict for the same party on the other issues.]

The plea of not guilty was a defence to the whole action. *Barker v. Dixon* (c) was an action on the

(a) 1 Saund. R. by Wms. 80, n. (1); 2 id. 300, n. (3).

(b) Stated by Lord *Lyndhurst*, ante, 941.

(c) 1 Wils. R. 44.

case for disturbance of common by inclosure. The general issue was pleaded, with a special justification under a custom for commoners to inclose ad libitum. That plea was proved, and a general verdict returned for the defendant. The court refused a motion for a new trial, on the ground that the plea of not guilty should have been found for the plaintiff, saying, that where several pleas are pleaded, each goes to the whole declaration, and if any one of them which absolutely destroys the plaintiff's action is proved, a general verdict for the defendant is right. In *Hick v. Keats* (a), where a court of error awarded a venire de novo to try issues on which the jury had found no verdict, the plea on which the verdict had been given was held to be no answer to the action.

[Lord Lyndhurst C. B. All has in fact been done by the arbitrator to enable the master to tax the costs, which would have been done at nisi prius by a similar finding of a jury on the general issue only. For if they had been discharged from finding any verdict on the other issues, the postea would take no notice of that discharge. So here, the arbitrator being silent as to the other issues, the situation of the parties is the same. The question whether the arbitrator was bound to decide every question raised on the pleas, including the justifications under *Hardiman*, depends on the special terms of this submission.]


The order of reference contains no directions to the arbitrator to find in what way the issues should be disposed of. His direction to enter a verdict for the defendants meant a general verdict. Such a finding by a jury would have sufficiently pointed out the proper entry on the roll. The jury being sworn to try all the issues joined, it may be right to tell them that some are become immaterial; but if that form

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(a) 4 B. & Cr. 69. In K. B. on error from C. P.

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should be omitted, they should not be called on to proceed to find what would be repugnant to their first finding. For though inconsistent defences may be raised by different pleas, it would be error if it should appear on one part of the record that defendants had not, and on another that they had, committed such trespasses (a). The submission contemplated the causes as one object, and the rights of such persons as should become parties to it, as the other. Now *Hardiman* never became such party. Then the arbitrator was not bound to inquire into his alleged rights, or to find how far they or the rights of the parties to the reference corresponded with the allegations of them in the pleadings. *Lill* is found to have no prospective rights in the locus in quo; it is therefore said, that had the arbitrator proceeded to dispose of the other issues, he would have necessarily found that *Lill* had not the right there claimed. But though *Lill* might not retain it at the time of making the award, it cannot be assumed that it did not exist at the time mentioned in the pleas. [Lord *Lyndhurst* C. B. As the jury has found that no trespass had been committed by the defendants, I do not see that *Lill* is differently situated from the other parties. Probably the arbitrator, in ascertaining and defining some of *Dibben's* and *Peyton's* rights, has in fact found and affirmed some of the special pleas; but he has found no rights in *Lill*. It is contended for the plaintiff, that the arbitrator should have applied his finding on the special matter of the future enjoyment of the parties' rights, eo nomine, to the respective issues. But his tribunal had the power to decide those rights generally.] In *Jackson v. Yabsley* (b) the court say that the award is sufficient, if,

(a) See on this subject, *Com. Dig. tit. Pleader* (S. 48.)

(b) 5 B. & Ald. 848. See *Blanchard v. Lilly*, 9 East, 497.

Looking at the whole of it, it appears that the matter is determined. Again, the award in the third cause, that the plaintiff had "no cause of action" against the defendants, is sufficiently certain; for it must be inferred, as in *Hayllar v. Ellis* (a), that the arbitrator considered the claims of both parties, and awarded accordingly. Nor could he award more specifically, no issues being yet raised. The latter part of the case is narrowed to the construction of 22 *Edw. 4. c. 7*. Its object was to enable persons not licensed by the crown to inclose woodland within a forest, chase, or purlieu, after felling the trees, without affecting crown rights. *Barrington's* case confirms that view of it. (The *Court* here stopped him.)

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*Barstow* in reply. Assuming that a judge or an arbitrator possesses a power to discharge a jury from finding a verdict on such issues as he may deem immaterial, and exercises it, the fact of that discharge should appear on the nisi prius record; or the entry on each roll would be as to one issue only, without showing the result of the rest, and it could not be sent to a court of error. In *Powell v. Sonnett* (b) it was possible to make up the roll from the nisi prius record, so as to dispose of the issues. The arbitrator has not directed the officer to alter the verdict taken for the plaintiff in the second cause, except on one issue. Then can it be implied from the award that the officer is authorized to make an entry of a verdict for the defendant on that issue, and to alter the verdict as to the rest, by stating a discharge from entering any verdict as to the others? [Lord *Lyndhurst* C. B. The question is, whether the award is sufficient to show what the arbitrator meant?

(a) 3 M. &amp; P. 553.

(b) 3 Bing. 381.

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If error was brought, the officer of the court would mould the entry on the nisi prius record, according to the award "that a verdict be entered for the defendants accordingly." Were all the issues to be entered for the defendants under that word, the general rights set up in their pleas would be affirmed, though they have been found by the arbitrator to be limited only. The nisi prius record must either be moulded to discharge the jury from finding a verdict on the other issues, or the court must make up the record on all of them.

Lord LYNDHURST C. B. (5th May).—After the general finding of the arbitrator, that the defendants had not committed the trespasses alleged, it could not have been material to procure his specific decision on the other issues, except with a view to costs. I am quite satisfied that as *Hardiman* had not become a party to the reference pursuant to the terms of the submission, the arbitrator was not bound by those terms to find any thing respecting him, unless called on at the time to enter a verdict on the remaining issues. But no such request appears to have been made to him, and I think he has substantially disposed of the matters referred. This court may make up the record, just as if the cause had been tried at nisi prius, and the jury had been discharged from trying the special issues. I am also of opinion that the act 22 *Edw.* 4. c. 7. does not apply to woods in which rights of common exist; and that the reasons given for Lord *Coke's* judgment in *Barrington's* case, as reported in 8 *Coke*, cannot be satisfactorily answered, though it appears from *Godbolt* that *Warburton J.* dissented. Whatever power was given to the Marquess of *Anglesea* or his predecessors by 22 *Edw.* 4. c. 7. seems to have been relinquished by them. I am also of opinion that 35 *Hen.* 8. c. 17. cannot apply, for by section 7. no severance of any part of a wood in

which there is immemorial right of common, can take place in order to inclose it before felling, except under certain regulations minutely detailed in that section. Section 8, which provides that that part so severed, bounded, and set out "in manner and form aforesaid," shall be sufficiently inclosed and fenced, and the inclosure kept up for seven years, also imposing a penalty upon any beast put in during that time, is distinctly limited to the woods described in section 7., *i.e.* to those in which there has been common from "time out of man's remembrance." In these causes, however, the commons are claimed, not by prescription, but grant. This rule must therefore be discharged.

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PARKE B.—The arbitrator has specifically found the rights of persons who came in as parties to the submission pursuant to its terms, and has disposed of all the matters substantially in dispute between the parties. Each party, however, had, at the time of the reference, a right to call on the arbitrator to enter a verdict on the remaining issues, in order to determine the costs of those issues; but as this was done by neither, they must be taken to be in the same situation as if the jury had been discharged, on a trial, from giving a verdict on those issues. The rights of *Hardiman* to common could not have come under consideration on these records. The result is, that in *The Marquess of Anglesea v. Dibben and Lill*, the defendants will have the general costs of the cause on the general issue, and neither party will have any costs on either of the other issues. On the special facts stated by the arbitrator for our consideration, I entirely concur with the lord chief baron on both points.

BOLLAND and GURNEY Bs. concurring,

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In *Michaelmas* term 1834, *Barstow* moved in *The Marquess of Anglesea v. Peyton, Dibben, and Lill*, for a rule to review the taxation, by which the master allowed the defendants the costs of all the pleas. This cause, though not at issue at the assizes at which the other causes were referred, was included in the submission. He contended that the costs should be taxed on the same principle as in the action against *Dibben* and *Lill*. Secondly, the master allowed the defendants the whole costs of the reference, though the verdict, which was entered generally for the plaintiff, was only altered by the arbitrator on one issue, and many of the eleven days occupied in the reference was spent in ascertaining the rights set up on the other issues.

Lord LYNDEHURST C. B. as to the first point.—This cause having arrived at the pleas, was referred in that stage of it. Then the agreement is “that the costs of the respective causes, and of so much of the reference as may relate to the said causes, do abide the event of the said causes respectively;” so that they do not depend on the event of the issues. As no issues existed in this case, the arbitrator had no power to decide, and did not decide any thing on the pleas, but adjudged that the plaintiff had no cause of action. Then all the defendants’ costs incurred in their defence must follow.

On the other point, *Manning* for the defendants, said that the ascertaining the commoners’ rights on the reference, took place principally with a view to found the contemplated act of parliament; and that the arbitrator had awarded all the costs over which he had control to be paid by the marquess.

*Barstow* supported his rule, and claimed to be allowed

the costs of a judgment for the plaintiff in the second cause on demurrer to the sixth plea, the record being now to be made up.

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LORD LYNTHURST C. B.—The master certifies that he allowed the marquess one day's expenses on account of that part of the costs of the reference which applied to matters not in issue in the causes. The award of costs covers the whole.

PARKE B.—The costs now in question are those of the pleadings only; and we are bound by the order of reference directing the costs to abide the event of the causes. It might have been made a part of that order that the arbitrator should distinguish as to these costs. The arbitrator has in fact nonsuited the plaintiff. The arbitrator should have been asked to award to the plaintiff the costs of the judgment on demurrer.

ALDERSON B.—On a nonsuit all the costs are taxed against the plaintiff, he being supposed to have agreed to that step instead of going to the jury. That case resembles the present.

Rule discharged.

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BAZLEY *against* THOMPSON.

**T**HE SINGER showed cause against a rule to set aside an interlocutory judgment signed by the defendant in an action of replevin. The ground for signing judgment was, that the plaintiff, in an action of replevin removed from the sheriff's court, appeared by one *Frank Dickens*, who was not an attorney in the book kept at the office of the clerk of the pleas, pursuant to *Reg. Gen. Mich. 1 Will. 4.*, but his residence

Irregularity in appearing by a person who is not an attorney of the court, does not entitle the opposite party to sign judgment, but only to move to set aside the proceedings.

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was described of 60 *Nelson-square*. On inquiry there, and in the neighbourhood, no such person was found. In *Hawkins v. Edwards* (a) where process appeared to be sued out in the name of *Yates* by *Luttrell*, neither of them being attorneys of the court in which it was sued out, and *Luttrell* had no authority from any other attorney to act in his name, the proceedings were set aside, with costs to be paid by *Yates* and *Luttrell*. *Abbott v. Rice* (b) differs from this case.

*Heaton contra*. Though this was a clear irregularity, upon which the court might, on motion, set aside the proceedings, they were not so ipso facto null as to authorise the signing judgment. For all that appears this person may be an attorney of the King's Bench, though not on the rolls of this court. He cited *Welch v. Pribble* (c).

LORD LYNDEHURST C.B.—Application should have been made to stay the proceedings, for they cannot be treated as a nullity where the party appears by a man who is an attorney.

PARKE B.—How is the client to know that he employs a man who is not an attorney? In *Welch v. Pribble* it was held, that a bail-bond should not be cancelled because the attorney who took out the writ had neglected to take out his certificate. There he was liable to penalties for practising without a certificate.

Rule absolute.

(a) 4 B. M. 603.

(b) 3 Bing. 132.

(c) 1 D. & R. 215.

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WILBY *against* HENMAN.

**A**SSUMPSIT for goods sold and delivered. Pleas, general issue, and that the causes of action did not accrue at any time within six years before the commencement of the action. Similiter and replication traversing the second plea. The action was commenced in *March 1832*. At the trial before *Taunton J.* at the *Lent assizes for Leicestershire* in 1834, the plaintiff's single witness stated, that having received a letter from the plaintiff's attorney claiming a debt as due from the defendant, he carried it to him in *February 1832*. The defendant said, "it had been standing a good bit;" and the witness was not certain whether he did not add, "for six or seven years." No evidence was given in support of the replication to show that the debt was contracted within six years, nor was the time of delivery of the goods shown by the defendant to have taken place at an earlier period. The learned judge was requested to ask the jury whether the cause of action did not arise more than six years ago? He directed a verdict for the plaintiff for the amount claimed, with liberty to move to enter a nonsuit, on the ground that no evidence had been given by the plaintiff in support of his replication, viz. that the cause of action arose more than six years before the action was brought. A rule having been obtained by *Hildyard* accordingly,

*Balguy* and *Humfrey* showed cause. As the time when the debt was contracted did not appear, the defendant's expression *prima facie* admitted a debt, for which he might legally be sued. [*Vaughan B.* If it admitted

made in some writing signed by the defendant, so as to take the case out of the statute, pursuant to 9 G. 4. c. 14.;—and a nonsuit was entered accordingly.

In assumpsit for goods sold and delivered, the general issue and a plea of the statute of limitations were pleaded. The plaintiff's replication traversed the latter plea. His evidence consisted of such an admission by the defendant as would have been evidence to go to a jury on the general issue, that a debt was owing from him to the plaintiff; but he did not prove when the debt was contracted. No evidence was given for the defendant in support of his plea. Held, that it was incumbent on the plaintiff to support the affirmative terms of his replication, by showing that the debt was contracted within six years, or that the acknowledgment or promise was

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a cause of action to exist, the plaintiff must show when it arose.] The existence of a cause of action existing at some time having been made out by the acknowledgment, the onus was thrown on the defendant to support his plea, by showing that it arose more than six years ago; and without such proof, it is a fallacy to assume that it did. Till such evidence is given by the defendant, as, if uncontradicted, would bring the claim within the statute, it is unnecessary for the plaintiff to support his special replication, by taking it out of the statute. In *Hurst v. Parker* (a); Lord Ellenborough says, "in assumpsit, an acknowledgment of the debt is evidence of a fresh promise;" and the court of King's Bench, in *Tanner v. Smart* (b), adopt that as the true reason; adding, "that promise is considered as one of the promises laid in the declaration, and one of the causes of action which the declaration states." [Vaughan B. Those cases were before stat. 9 Geo. 4. c. 14.; since which the acknowledgment or promise, to be evidence of a new promise, must be in writing, in order to take a case out of the former statutes.]

*Hildyard* in support of the rule. The replication, by its affirmative terms, throws on the plaintiff the onus of establishing that the cause of action accrued within six years. The words of 9 Geo. 4. c. 14. that no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case "out of the operation of the said enactments," &c., unless it be in writing, signed by the party chargeable, must mean to take a case out of a *plea* of the statute. The court said: they would confer with the learned judge who tried the cause, and on a subsequent day, (29th April),

(a) 1 B. &amp; Ald. 92.

(b) 6 B. &amp; Cr. 606.

VAUGHAN B. (a) delivered his judgment. This was an action for goods sold and delivered; the pleas were the general issue and the statute of limitations, *actio non accrevit infra sex annos*. One witness was called; he said, that having had a letter from the plaintiff's attorney claiming a debt from the defendant he carried it to him. The defendant said, that it had been standing a good bit, and the witness could not undertake to say, whether the defendant did not add, that it had been standing for more than six or seven years. No other evidence was given one way or the other, to show when the demand arose. The learned judge being then called on to ask the jury whether it did or did not arise more than six years before action brought, declined to do so, and directed a verdict for the plaintiff, with leave to move to enter a nonsuit, for want of affirmative proof by the plaintiff that the goods were delivered within six years before action brought. It has been argued to be incumbent on the plaintiff to show positively that it arose within that time, as the party who maintains the affirmative is bound to prove it. If the plea of the general issue only had been on the record, without that of the statute of limitations, there would have been sufficient evidence to go to the jury as an admission of a debt; but with the other plea of the statute on the record, was there any evidence from which the jury could draw the conclusion that it arose within six years? As to the necessity of the affirmative being proved, Lord *Tenterden's* act 9 G. 4. c. 14, after reciting that "various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out

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(a) Lord Lyndhurst was sitting in equity.

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of the operation of the former statutes of limitation, 21 Jac. 1. c. 16. and 10 Car. 1. (Ir.) sess. 2. c. 6., enacts, that in actions of debt, or upon the case, grounded on any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereto. It is desirable that this act should not be frittered away. *Willis v. Newham* (a) was very different in circumstances; for there the action on a promissory note appearing on the face of it to be more than six years old; it was proved, that when the defendant was arrested, he said "it was a hard case, as he had paid the plaintiff 10*l.* only a short time before." It was contended, that this was proof of payment by admission, so as to bring the case within the proviso of the 9 Geo. 4. c. 14. "that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever;" but the court held, that this applied to the fact of payment, and not to the declaration of payment, which was all the defendant was shown to have made, and the defendant had judgment. Under the circumstances of this case it was, therefore, necessary to prove the affirmative under the statute; and as the plaintiff has not done so, a nonsuit must be entered.

BOLLAND B.—The question is, whether it is, or is not imperative on the plaintiff to prove the affirmative of the issues joined. By his pleas the defendant says, "I do not owe you the money, and if I do, it is not

(a) 3 Y. & J. 518.

such a debt as the rules of law allow to be recovered." The plaintiff only offers proof of an admission that the defendant told a person whom he sent that he owed him a sum named. This would have been conclusive on the first issue; but on the second, the defendant puts the plaintiff to prove the issue he (the defendant) tendered, viz. that the debt was contracted within the time required by the law. If we held this plaintiff's proof to be sufficient to enable him to recover, we should open a door to plaintiffs to defeat the statute by evidence, which, if offered in order to take a case out of it, would not have been admissible for such a purpose.

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WILLIAMS B.—To hold for the plaintiff on this record would be to take away the plea of the statute of limitations, and to leave the record as if only the general issue had been pleaded. Though the admission proved would have been sufficient *prima facie* evidence of a cause of action, had only the general issue been pleaded, still under the special plea of the statute, some written evidence should have been produced for plaintiff to take this case out of the statute of limitations in the manner provided by 9 Geo. 4. c. 14.; and as there is none such, a nonsuit must be entered.

Rule absolute accordingly.

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MELLOR *against* BADDELEY and Another.

In an action against a party for maliciously and without probable cause informing against the plaintiff for an offence, it is a sufficient answer to say that the plaintiff having been convicted of trespassing on land in pursuit of game, in the day-time, under stat. 1 & 2 W. 4. c. 32., underwent the sentence of imprisonment according to that conviction, without appealing against it within the time, and in the manner, pointed out by section 44 of that act.

**CASE.** The first count of the declaration stated that the plaintiff is a good, true, and faithful subject &c., and hath never been guilty of poaching or unlawfully been guilty of any trespass in search of game &c., yet that the defendants, contriving, &c. on &c., appeared before one *J. S.* one of the justices &c., and maliciously, and without any reasonable or probable cause, caused a certain false and malicious information to be exhibited against the plaintiff, for that he the plaintiff did, on &c. unlawfully commit a trespass by entering and being in the day-time upon a certain common or piece of land, in the possession and occupation of *D. B. Baddeley* there, in search of game, and, upon such information, maliciously, and without any reasonable or probable cause, caused the said *J. S.* to grant his summons for the summoning of the plaintiff before him the said *J. S.* on &c., then next, to answer the said information; that the defendants caused the plaintiffs to be served with said summons; that the defendants, on the &c., maliciously, and without any reasonable or probable cause, caused the said *J. S.* wrongfully and illegally to convict plaintiff of supposed offence in information specified, and to adjudge that he should forfeit 2*l.*, together with 1*l.* 10*s.* for costs, and in default of payment be imprisoned two calendar months; and that the defendants maliciously, and without probable cause, caused the said *J. S.* to grant his certain warrant of commitment, whereby the constable of *Stoke-upon-Trent* was commanded to convey the plaintiff to gaol, and the keeper of the common gaol was commanded to receive and keep the plaintiff in the said gaol for two calendar months, unless the penalty and

costs should be sooner paid; and that the defendants maliciously, &c. caused said plaintiff, under and by virtue of said commitment, to be arrested, and to be conveyed to gaol, and wrongfully and maliciously caused him to be imprisoned without probable cause for two calendar months, at the expiration of which said time the plaintiff was duly discharged and fully released from the said gaol.

The second count stated, that the defendants, contriving as aforesaid, on &c., charged plaintiff with having committed an offence punishable by law, to wit, with having committed a trespass, as in the information set out in the first count, and that defendants upon the last-mentioned charge maliciously, and without probable cause, procured *J. S.* to grant a warrant of commitment, whereby &c. (as in first count) and that defendants, under and by virtue of such commitment, caused plaintiff to be arrested and imprisoned (as in first count).

Third count. That defendants, on 17th *April*, maliciously, and without probable cause, procured the plaintiff to be arrested under and by virtue of another warrant of commitment, whereby the keeper of the gaol was commanded to receive and keep the plaintiff in his custody for two calendar months, unless certain sums of money, to wit, 2*l.* and 1*l.* 10*s.*, should be sooner paid; and that the defendants maliciously, and without probable cause, procured the plaintiff to be imprisoned, under and by virtue of the said warrant, for two calendar months.

Fourth count. That the defendants contriving, &c. as aforesaid, procured the plaintiff to be unlawfully imprisoned &c. and on &c., wrongfully, and without any probable cause, charged the plaintiff with having committed a certain other offence punishable by law, to wit, a trespass (as in the first count), and upon

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such said last charge &c. wrongfully, and without probable cause, under and by virtue of a certain warrant or commitment, caused the plaintiff to be arrested and imprisoned for two calendar months.

At the trial before *A. Park J.*, at the last *Staffordshire* assizes, the plaintiff was nonsuited, on the ground that as there existed a conviction against him under 1 & 2 *W. 4. c. 32. s. 30.* for trespassing on lands in the day-time, against which he had not appealed pursuant to s. 44. of that act, the action would not lie, as the prosecution against him could not be shown to have terminated in his favour.

*Greaves* moved to set aside the nonsuit, on the ground that as the proceeding complained of as malicious, was not civil but criminal in its nature, no case had decided that in order to maintain an action for originating it, it must be shown to have terminated. He sought to distinguish *Matthews v. Dickensan* (a) and *Whitworth v. Hall* (b), on that ground. This being a criminal proceeding, there was no mutuality; for had there been a refusal to convict, the plaintiff could not have proved that refusal in an action against him for trespass. He also cited *Smith v. Rummen* (c), and other cases collected 1 *Stark. Evid.* 235, 6, and 7, to show that the conviction could not be evidence in favour of the defendant in this action, for it was obtained on the oath of one of the defendants.

The Court (d) intimated a strong opinion against granting the rule, but deferred pronouncing upon the motion till after learning the precise nature of the evidence adduced from the judge who tried the cause.

(a) 7 Taunt. 399.

(b) 2 B. & Adol. 695.

(c) 1 Camp. 9.

(d) *Vaughan, Bolland, and Williams, Bc.*

Their opinion was delivered on a subsequent day  
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VAUGHAN B.—This was an action against the defendants for maliciously and without probable cause laying an information before a magistrate against the plaintiff, and causing him to be imprisoned thereon. The declaration having set out the summons and a conviction under the game act 1 & 2 W. 4. c. 32. s. 30., alleged, that a penalty and costs were imposed by the conviction, for the non-payment of which the plaintiff was committed to prison, and kept in custody there for two months. The action was not brought against the defendant for any act done by him in his character as a magistrate, but for maliciously laying an information without reasonable or probable cause. The plaintiff's counsel in the course of his case, after having examined some witnesses, was interrupted by the statement of the counsel for the defendant, that they could produce a conviction under 1 & 2 W. 4. c. 32. for trespassing in pursuit of game, which not having been appealed against, pursuant to section 44 of the act, afforded a conclusive answer to the charge of malice and want of probable cause for the information. The plaintiff was nonsuited, on the ground that he ought to have appealed within the time limited by sect. 44. We are of opinion that to support this action it was necessary that there should have been proof of a prosecution which had been discharged and put an end to, and also of want of probable cause and a damage sustained in consequence of the prosecution. The declaration contains counts, some for causing the plaintiff to be committed, and others for causing him to be arrested; but all substantially state the same cause of action, and the simple question is, whether this conviction unreversed must of necessity be an answer to the action,

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as showing probable cause for laying the information complained of? It is unnecessary to refer to many cases, but there is one of *Whitworth v. Hall* (a) which will direct the present. That was an action against a party for maliciously suing out a commission of bankruptcy, which was not proceeded in, and therefore not brought to an end. There Lord *Tenterden* said, "an action cannot be supported for maliciously holding to bail, without showing that the proceedings were at an end, and yet the discharge from arrest is in the discretion of the court;" and *Littledale J.* added, "there is no distinction between the action for a malicious prosecution by indictment or for a malicious arrest, and one for maliciously suing out a commission of bankrupt. In all of them it is necessary to show that the original proceeding which formed the alleged ground of the action is at an end." In this case the conviction under 1 & 2 W. 4. c. 32. being summary, section 44 gives to the party convicted an appeal from it to the quarter sessions, provided he gives the complainant a notice in writing within three days after such conviction, and shall also either remain in custody till the sessions, or within such three days enter into a recognizance to appear and try such appeal. The plaintiff in this case neither gave notice of appeal nor entered into such recognizance, but suffered the punishment awarded on the conviction. Therefore, as he acquiesced in it, that was conclusive evidence of probable cause, and the prosecution was not discharged.

Rule refused (b).

(a) 2 B. & Adol. 696, 697.

(b) See *Manney v. Johnson*, 12 East, 67; *Gray v. Cookson*, 16 East, 13; *Aked v. Stocks*, 4 Bing. 109; 1 M. & P. 346, S. C.

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**CROWFOOT and Others** (assignees of **STREATHER**, a bankrupt,) *against* **The LONDON DOCK COMPANY.**

**TROVER** for certain steam-engines, machinery, implements, and building materials. The cause and all matters in difference between the parties were referred to a barrister, who in his award certified, in pursuance of the submission, that the following were the facts of the case, as proved before him.

On 29th September 1829, a contract was entered into between *R. Streather* the bankrupt of the one part, and *J. Warre esq.* as treasurer of, and for and on behalf of the *London Dock Company*, of the other part, as follows: That the said *R. Streather* should and would execute and perform, in a substantial and workmanlike manner, the whole of the works required in the

*S.* contracted with the defendants to execute an extensive building operation for them, in consideration of a certain sum, and of being allowed to use certain materials. The defendants' engineer was empowered to reject any materials or work not in his opinion conformable

to the plans and specifications, and to provide other materials, and employ competent persons to perform the work, if *S.* failed to do so, as well as to deduct the amount from the sum payable to him under the contract. The defendants were at liberty to diminish or add to the works, paying *S.* at the contract prices accordingly, or deducting from them if necessary. *S.* placed on the defendants' premises steam-engines, rail-roads, materials, implements, and other articles of various kinds, necessary to carry on the works. The defendants' engineer visited the premises daily, and rejected such of the materials brought thither by *S.* as he thought unfit for use. During the progress of the works advances were made by the defendants to *S.* on his application; he agreeing that all the engines, materials &c., brought or to be brought on the defendants' premises for use in constructing the works, should be a security for such advances. Those advances always exceeded the value of the property so on the premises. *S.* became bankrupt before the works were completed, upon which the defendants erased his marks on the engines, materials, implements, &c. then on their premises.

In trover brought by the assignees of *S.* against the defendants to recover such engines, materials, &c.: Held, first, that the arbitrator had no power to award that the defendants were entitled to prove against the estate of *S.* for the sum advanced to him by them beyond the value of the work done and materials furnished by him, and of the engines, &c. agreed to stand as security. Secondly, That the plaintiffs were not entitled to recover for extra work done by the bankrupt. Thirdly, That as there had been such a possession of the engines, materials, &c. by the defendants as would support the lien, which it was the effect of the bankrupt's agreement to confer on them, the plaintiffs were only entitled to recover for such materials, &c. as were brought on the defendants' premises after the act of bankruptcy. Fourthly, That payments to the bankrupt by the defendants, after the latter portions of materials were brought on the premises, could not be considered as payments for those particular goods in the course of business, but as general advances only, so that they could not be retained by the defendants under 6 G. 4. c. 16. s. 82.




plans, and thereby add to or diminish any part of the intended works, without prejudice to or making void that contract; in which case a proportionate addition or deduction should be made to or from the sum to be paid to the said *R. Streather*, the amount of such addition or deduction to be computed according to the schedule of prices contained in the said specification. The said *J. Warre* did thereby undertake, promise, and agree, for and on behalf of the said company, to pay to the said *R. Streather* the sum of 52,200*l.* by the following instalments, upon the production in each case of a certificate signed by the company's engineer; viz. three-fourths of the cost of the work certified to have been done every two months. The first instalment to be paid whenever the said engineer should certify that the portion of work performed amounted in value to one-eighth of the whole, the remaining one-fourth within one month after the full completion of that contract. By a memorandum of agreement under seal, bearing date the 21st December 1830, the time allowed to the said *R. Streather* for completing the works was extended to the 28th March 1831.

On the 14th December 1829, the company gave notice to *Streather* to commence his works on the 28th of that month. *Streather* accordingly commenced his operations, inclosed the premises so as to exclude the public, had them watched by persons in his employ, and brought to them a great quantity of property of various descriptions in the building line for the purpose of carrying on the works. He had a counting-house and clerks on the premises, and erected thereon two steam-engines. The barrows, carts, picks, and other implements used in carrying on the works, were branded with his initials. *H. Palmer*, the company's engineer, superintended the works on behalf of the company, examined the materials brought upon the

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premises by *Streather*, and rejected such as he did not think proper for the purposes for which they were intended. *Palmer* resided in a house belonging to the dock company adjacent to the docks, and about 150 yards from the works in question, and was on the premises every day; the whole of the premises where the works were carried on, and upon which the machinery and materials were placed, belonged to the company. The arbitrator then certified, that on the 17th *May*, and before *Streather* was entitled by the terms of his contract to receive any money from the dock company, he requested an advance; that the company, on the 18th *May*, advanced him 3000*L*: that in *July* he applied to them for further advances, referring them to the engines, rail-roads, implements, and materials lying on the dock premises as their security. He then set out certain letters which passed between the company and *Streather* on that occasion as follows:—

“ *London Dock House, 20 July 1830.*

“ Mr. *Streather* is requested to furnish the best account in his power to form of the costs of the new works, so far as he has at present proceeded, distinguishing materials employed for the works, such as a steam-engine, rail-roads, platform, carts, barrows, &c. Secondly, materials used in the works, such as timber, iron, stone, bricks, lime, &c. Thirdly, wages for excavators, bricklayers, carpenters, stonemasons, &c. Mr. *Streather* will also state the value of the materials taken of the company which have not yet been used, but which remain on the premises.

“ *S. Cock.*”

To which *Streather*, on the 21st *July*, wrote and sent a letter containing the following passage:—

“ In obedience to the wishes of the committee, and to show that, in point of expenditure made by me in

requiring an advance of money, I am not doing it improperly, nor exposing the committee to any risk, I have made an estimate of the work really performed, the nearest account of the expenses necessarily incurred in the immense preparations required for carrying on a work of such magnitude I can give, and also the value of materials, implements, &c. now on the company's premises, and intended for their use."

This letter was accompanied by the following account:—

*New Entrance London Docks' Expenditure to the  
20th July 1830.*

Materials employed for the Works.

| Machinery.                                   | £.  | s. | d. |
|----------------------------------------------|-----|----|----|
| To cash paid for 30-horse power steam-engine | 950 | 0  | 0  |
| Ditto paid engineer for fitting up ditto     | 90  | 0  | 0  |

Labour and waste of materials in settling  
said engine.

|                                                                     |      |   |   |
|---------------------------------------------------------------------|------|---|---|
| Twelve rods of brick-work, masonry 16l. 8s., iron-work &c. at least | 100  | 0 | 0 |
| Sinking the well line of pumps, iron and wood cylinders, &c.        | 1000 | 0 | 0 |
| Extra boiler for said engine                                        | 130  | 0 | 0 |

Labour.

|                                                                                                                                                                                                                                               |     |   |   |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|---|---|
| To pile driving, to setting said engine the second time, viz. for pile driving, labourers' and carpenters' time thereon, and to framing timber, iron-work, to shoeing piles, and 1½ ton of iron in bolts, ties, &c. and 34 rods of brick-work | 500 | 0 | 0 |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|---|---|

|                                                     |      |    |    |
|-----------------------------------------------------|------|----|----|
| Machinery for connecting the pumps                  | 200  | 0  | 0  |
| Pumps, as per invoice                               | 172  | 10 | 0  |
| To a 10-horse-power engine                          | 270  | 0  | 0  |
| Fitting up do. 200l. a new boiler for do. 22l. 10s. | 222  | 10 | 0  |
| Consumption of fuel for both engines                | 413  | 11 | 10 |
| Iron rail roads, as per invoice                     | 500  | 0  | 0  |
| Twelve iron and 12 wood carts, and 50 barrows       | 362  | 0  | 0  |
| Labour to erection of a platform and stage          | 250  | 0  | 0  |
| Bridge and steps for foot passengers                | 200  | 0  | 0  |
|                                                     | 5360 | 11 | 10 |

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The account then contained a statement of work done, and materials provided to be thereafter used in the work, to the amount of £13,933.

On the 23d July, *S. Cock*, after receiving this account, wrote to *Streather* as follows:—

“ *London Dock House, 23 July 1830.*

“ SIR,—It appearing that the sum you are entitled to receive, according to the letter of your existing contract with the *London Dock Company*, is not, according to your representation, sufficient to enable you to make the greatest possible progress with the work, and which you are anxious to make, I am desirous of ascertaining, as nearly as possible, the value of the property employed, or lying upon the premises, but not used, or forming or being intended to compose part of the works which you consider a security to the company for any advance which the directors may be disposed to make you beyond the three-fourths of the value of the work, according to the contract certified by the company's engineer to have been done every two months. I shall also thank you to send me, at your earliest convenience, your estimate of the value of the work actually executed according to the contract prices.

“ *S. Cock.*”

To which *Streather*, on the 24th July, wrote and sent the following answer:—

“ SIR,—In answer to your letter of the 20th instant, and the return thereon made the 21st, I beg further to observe, that if the sums, as explained by the items below, are deducted from the amount stated in the first article of 5360*l.* 11*s.* 10*d.*, there will then remain the sum of 4597*l.* as a bonâ fide security to the

company for any advance they may be pleased to make beyond the proportions stipulated by the contract."

The items at the foot of the letter were as follows:—

|                                            | £.    | s. | d. |
|--------------------------------------------|-------|----|----|
| First setting of the large engine - - - -  | 100   | 0  | 0  |
| Fuel for both engines - - - -              | 413   | 11 | 10 |
| Labour to the erection of the platform - - | 250   | 0  | 0  |
| Security - - - - -                         | 4597  | 0  | 0  |
|                                            | <hr/> |    |    |
|                                            | 5360  | 11 | 10 |
|                                            | <hr/> |    |    |

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The arbitrator found that the company made advances to *Streather* beyond the sums which he was entitled to receive according to his contract; and that *Streather* agreed that all the engines, implements, and materials on the premises, and from time to time brought upon the premises, to be used in constructing the works, should be a security to the dock company for their advances; and that the company made advances on the faith of that security, and from July 1830, down to the bankruptcy of *Streather*, were always in advance to an amount exceeding the value of the property on the premises; but *Streather* was allowed to use the engines and implements, and carry on the works in the same manner as before any of the advances were made; nor did the dock company do any thing towards taking actual possession of the property until after *Streather* had quitted the works, when they erased *Streather's* marks and put the letters *L. D. C.* on the engines, implements, materials, &c. On the 1st of November 1830, *Streather* had received of the company 32,050*l.* in cash, and materials of the value of 3500*l.*, making together 35,550*l.*, and had performed work to the value of 23,000*l.* On the 6th November *Streather* made by his clerk another application for advances, and pointed out, amongst other things, the steam-engines, iron-rails, and materials on the pre-

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unises, as constituting a security to the company. The company requested some further security, whereupon *Streather* offered to assign to them a debt of £700. due to him from the *Union Building Society*. This was accepted as security for that sum, and has since been paid off by the building society. On the 16th *March*, *Streather* committed a secret act of bankruptcy, which remained unknown, and the works were continued by his servants and workmen until the 18th *April*, when he finally quitted them. A commission of bankrupt was issued against him on the 21st *April*. Before this act of bankruptcy was committed, *Streather* had received from the company £47,443*l.* in cash; on the 19th *March* he received a further sum of £375*l.*, and on the 25th £337*l.*, making together £48,165*l.*, and they afterwards, in the months of *April* and *June*, paid for bricks &c. which had been supplied on their credit for the use of the works, the sum of £1464*l.* The work done by *Streather* up to the 14th *March* was at the contract prices of the value of £34,388*l.*, and he afterwards did work amounting to the value of £204*l.* 16*s.* When *Streather's* bankruptcy became known, and he ceased to carry on the works, the company took possession of the engines, machinery, implements, &c.; some had been on the premises from the 20th *July* 1830, and were taken possession of by them, of the value of £310*l.*; others were brought to the premises by *Streather* between 20th *July* and 28th *December* 1830, and these, when taken possession of by the company, were of the value of £654*l.* The bricks and stone on the premises when *Streather* quitted, and which were taken possession of by the company, were of the value of £442*l.* 2*s.* 6*d.*, were supplied after *Streather* had committed an act of bankruptcy, and the whole of them were supplied to *Streather* on the

credit of the company, and were paid for by them. The company, since *Streather's* bankruptcy, have completed the works as far as practicable, according to the scale of prices in *Streather's* contract of 18,875*l.* 3*s.* 2*d.* Of the work done by *Streather*, a part, to the value of 4140*l.* 13*s.*, was for extras occasioned by deviations from the original plans, and some things were omitted out of the original plans, which occasioned a deduction to the amount of 408*l.* 16*s.* 10*d.*, but both extras and omissions were taken into account in making the valuation of work actually done by *Streather* before the 14th *March* 1831, amounting to 34,388*l.* On 21st *April* 1831, a commission of bankrupt was duly issued against *Streather*, under which the plaintiffs were duly chosen assignees; and on the 24th *May* 1831, they demanded of the dock company the engines, implements, and materials above mentioned, and which had been taken possession of by the company. The company refused to deliver them, and afterwards used and applied some of the materials in finishing the works, and sold others, and some still remain on their hands. The plaintiffs claimed a right to recover in the action 5173*l.* the value of the property of which the company took possession when *Streather* ceased to carry on the works. As to that claim, the arbitrator awarded that the plaintiffs were entitled to recover in the action one shilling damages only; but if the court should be of opinion that they were entitled in their action to recover any larger sum, then he awarded, that the plaintiffs were entitled accordingly. The plaintiffs further claimed from the defendants the sum of 4149*l.* 13*s.* 6*d.*, the value of the extra work done by *Streather*, and which was made necessary by deviations from the original plans and specifications. The value of this extra work was included in the valuations of the

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work done from time to time, and mentioned in the surveyor's report to the dock company. As to that, the arbitrator awarded that the plaintiffs were not entitled to receive that sum, or any part of it, from the dock company, but if the court should be of opinion that the plaintiffs were entitled to recover the whole or any part of that sum from the defendants, then he awarded that the plaintiffs were entitled accordingly. On the other hand, the company contended that they had paid to *Streather* 48,155*l.*, and for bricks 1464*l.*, making together 49,619*l.*: that the value of the work done was only 36,429*l.*, and that the difference, 13,190*l.*, must be considered as a loan by the company to *Streather*: that the value of the materials, implements, &c. had as a security, was 5173*l.*, leaving 8017*l.* unprovided for, which the company claimed a right to prove under the commission against *Streather*. As to that, the arbitrator was of opinion that the company were entitled to prove under the commission for the sum of 8017*l.*, and, as far as he had power so to do, he awarded that they be permitted to prove accordingly. In *Trinity* term 1833,

F. Kelly for the plaintiffs obtained a rule to show cause why the award should not be amended by increasing the damages to the sum of 5173*l.*, and by striking out so much of the award as awarded that the company should be permitted to prove under *Streather's* commission for the sum of 8017*l.*

F. Pollock, *Follett*, and *F. Robinson* now showed cause for the defendants. The plaintiffs principally rely on this point, that they are entitled to have the verdict entered for 5173*l.*, the value of the machinery and materials which were on the premises when *Streather*

became bankrupt; and the argument is, that although the arbitrator found that advances were made by the defendants to the bankrupt beyond that amount, upon an agreement that the defendants were to have a lien on the machinery and materials, still no sufficient possession passed to the defendants for the purpose of creating a lien. Next, it will be said that the bankrupt was allowed to have the order and disposition of the machinery, materials, &c. at the time of his becoming bankrupt; in which case it is said that the right of the property would pass to the assignees under section 72 of the bankrupt act. It is true there can be no lien without possession; *Kinloch v. Craig* (a), *Patten v. Thompson* (b), *Taylor v. Robinson* (c). But in those cases the parties claiming the lien had no sort of possession; here, the defendants certainly had some possession. The property in question was brought, placed, and left on their premises; and though that part of their premises is found by the arbitrator to be inclosed, that inclosure was only for the purpose of excluding the public. The defendants, and especially their servant the engineer, obviously continued to have free access to them. In this case, possession of the property has been given in the only way which the circumstances of the case rendered possible. Had the bankrupt been altogether excluded from meddling with the property, the very object of the transaction would have been frustrated. The case of *Manton v. Moore* (d) is a strong authority in favour of the defendants upon this point, though it is true that it was not a case growing out of the bankrupt law. Supposing then that the defendants would at common law be entitled

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(a) 5 T. R. 119.

(b) 5 Maule & Selw. 350.

(c) 8 Taunt. 648.

(d) 7 T. R. 67.

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to the benefit of their lien, is there any thing in section 72 of the bankrupt act to deprive them of that benefit?

It is submitted there is not, in the first place, so far as respects a considerable part of the property in dispute, viz. the engines, rail-roads, &c., &c., fixed to the freehold. It is clear that 6 Geo. 4. c. 16. s. 72, which applies only to goods and chattels, does not affect the case; *Horn v. Baker* (a). Secondly, that section contemplates two distinct parties, the reputed owner and the real owner; it operates as a punishment on the real owner for allowing the trader to be reputed owner; here, it is not pretended that the right of property passed to the company. The bankrupt therefore was himself the real owner, so that the case does not fall at all within this provision of the bankrupt act, even admitting that he was the reputed owner too; *Joy v. Campbell* (b), *Kirkley v. Hodgson* (c). Nor is any inconvenience likely to arise from this construction of the act; because when the bankrupt unites the two characters of real owner and reputed owner, the property would, in almost every case where a lien has been created, pass to the assignees; not indeed by virtue of section 72., but by the general conveyance under the commission. But, thirdly, by waiving these answers in point of law, the facts of the case, as found by the learned arbitrator, are not by any means sufficient to show that the bankrupt was the reputed owner of the goods within the meaning of this section. Not only has the arbitrator omitted to draw that conclusion, but the facts which he


(a) 9 East, 215; see *ante*, Vol. III. 618. *Coombs v. Beaumont*, 5 B. & Adol. 72. *Hubbard v. Bagshaw*, 4 Simons's Rep. 326; *Rufford v. Bishop*, 5 Russell's Rep. 346; *Steward v. Lombe*, 1 Brod. & Bing. 506; *Dudley v. Ward*, Ambler, 113.

(b) 1 Scho. & Lef. 311.

(c) 1 B. & C. 583.

has found are inconsistent. *Collins v. Forbes* (a) is almost an express authority for the defendants; indeed the claim of the assignees in that case was more plausible than that of the plaintiffs in the present, for the goods were there received into the victualling yard as the goods of the bankrupt, without any sort of compact with the commissioners, which would prevent his dealing with them as his own. But, fourthly, if the facts found do lead to the conclusion that the bankrupt was quodammodo intrusted with possession of the goods, those facts, at the same time, show that it was a possession for a special purpose, viz. for the purpose of applying those materials &c. to the performance of his contract with the company; and if so, there is a well recognized class of authorities to show that such a limited possession does not bring a case within this section of the bankrupt act; *Ex parte Flynn* (b), *Copeman v. Gallant* (c). But, secondly, the plaintiffs contend that if they are not entitled to have a verdict entered for 5173*l.*, the price of the engines, materials, &c. which were on the premises at the time of the bankruptcy, they are at all events entitled to have a verdict entered for 316*l.*, the value of certain bricks brought on the premises by the bankrupt after his bankruptcy. The arbitrator, as to these, has found as a fact that those bricks were supplied on the credit of the company and paid for by them. The affidavits show that the evidence did not establish that fact; but admitting the arbitrator to have been mistaken in finding it, the court will not send the matters back to him if other facts are found which are sufficient to sustain the award. Now that is the case here; those bricks were supplied before the date of the commission, and may there-

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(a) 3 T. R. 316.

(b) 1 Atkyns, 185.

(c) 1 Peere Wms. 314.

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fore be considered as paid for by the sums of \$75*l.* and \$37*l.*, which were paid to the bankrupt before his bankruptcy on the 19th and 25th of *March*; if so, those payments are protected by section 82 of the bankrupt act, *Cash v. Young* (a); even if the payment were before the delivery of the goods, that fact would not alter the case, *Hill v. Farnell* (b); but it is not here shown that the payment was before the delivery. In *Bishop v. Crawshay* (c), where an acceptance was given in advance for goods ordered to be made, the payment was considered not to be protected, because it was said that the defendant there was not a debtor at the time he accepted the bills. That case was therefore certainly not within the protecting section of 1 *Jac.* 1. c. 15., but the word *debtor* is omitted in the corresponding section 82 of stat. 6 *Geo.* 4. c. 16. The next point raised by the plaintiffs is, that if they are not entitled to have the verdict increased, still the arbitrator, on the reference of all matters in difference, should have found that the plaintiffs were entitled to the sum of 4140*l.* 13*s.* 6*d.* for the extra work done by the bankrupt; against which, it is said, that the company could not set off the unliquidated damages sustained by the non-performance by the bankrupt of the contract works, and the extra works have been ever considered as forming one entire work, and paid for accordingly. By the terms of the contract the extras are not treated as intended to form a distinct item, but a proportionate addition or deduction was to be made to or from the sum to be paid to *Robert Streather*. If these extras were not to be blended with the rest of the work, and so paid for, how were they to be paid for? Was the bankrupt to be paid for the extras in ready money, or was he to wait till the final completion of the whole work?

(a) 2 B. & C. 413.

(b) 9 B. & C. 43.

(c) 3 B. & C. 413.

It is manifest the items of extra work were to be added to the periodical payments stipulated for by the contract ; and if so, they have already been greatly overpaid. (The Attorney-General here intimated that he did not intend to press this point.) The only remaining point is, whether the assignees are entitled to prove 8020*l.* 4*s.* against the bankrupt's estate It is objected that this constitutes an item of unliquidated damages, and cannot therefore be proved under the commission; but it can easily be shown that to the extent of that sum, at least, the damage of the company is already liquidated, whatever further loss they may have incurred. [Parke B. The arbitrator had no authority to decide that matter ; it could not be done behind the backs of the commissioners and the creditors. He could not make any award on that point which could bind the commissioners.]

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Sir J. Campbell (Attorney-General) and F. Kelly contra. The plaintiffs are entitled to have the verdict entered for the full value of the machinery and materials. It is not necessary for them to resort to section 72 of the bankrupt act 6 *Geo.* 4. c. 16., to which however the principal part of the argument on the other side has been addressed. The assignees are entitled to recover the value of the machinery and materials independently of that enactment, for it is in effect conceded by the defendants that the property in the machinery &c. remained in the bankrupt. They would therefore pass to his assignees, unless the defendants are entitled to hold them by virtue of the lien; and it is submitted that they had no such right. To the creation of a valid lien at common law, under such circumstances as the present, two things are essential; first, it must be shown that there was a binding agreement to that effect; secondly, it must be shown that the goods

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were put into the company's possession, *Kinloch v. Craig* (a); and it must be actual possession; *Nichols v. Clent* (b), *Taylor v. Robinson* (c). It may be contended that here there was never any binding agreement that the company should have a lien on the machinery and materials for the amount of their advances. The bankrupt states in his letters what security he could give, but it does not appear that it was actually given; but, admitting that there was such an agreement, still there was no sufficient delivery of possession to give legal effect to it. The property was kept on premises inclosed for the purpose, and watched by *Streather's* servants; and the arbitrator expressly finds that *Streather* was allowed to use the engines and implements, and carry on the works in the same manner as before any advances were made; nor did the company do any act towards taking actual possession of the property until after *Streather* had quitted the works. That was after he had become a bankrupt; how then can it be said that the company ever had such a possession as would support a lien? *Collins v. Forbes* seems at first sight a strong authority for the defendants; but *Laurence J.*, who was in that case, expressed his disapprobation of it on a subsequent occasion. *Gordon v. East India Company* (d), and the case of *Manton v. Moore* (e), on which reliance has also been placed by the other side, are wholly inapplicable to the present case. The latter was not a case of lien, but was merely a decision what delivery of possession would be sufficient to negative fraud so as to protect a vendee against a subsequent execution; besides which, it is to be observed, that a symbolical delivery was there given. That case therefore leaves wholly un-

(a) 5 T. R. 119.

(b) 3 Pri. Rep. 547.

(c) 8 Taunt. 648.

(d) 7 T. R. 257.

(e) 7 T. R. 67.

touched the question, what is a sufficient delivery of possession to support a lien?

Upon the second point, the plaintiffs are clearly entitled to have a verdict entered for such of the bricks brought on the premises subsequent to the act of bankruptcy, as were not supplied on the credit of and paid for by the defendants. The arbitrator has found that they were all supplied on their credit, and paid for by them; but the plaintiffs' affidavits show, that as to the 316*l.*, this was not the fact, and those affidavits are not contradicted by the defendants. [*Parke B.* There certainly seems to have been a mistake as to some of the bricks in that respect, and unless you can agree upon the amount, it should be referred back to the arbitrator to re-state that part of his award.] Upon the subject of the proof under the bankrupt's estate, the arbitrator had clearly no right to adjudicate. [The Court intimated, that on this point they thought the award could not be supported.]

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PARKE B. (a)—This motion was made to alter the learned arbitrator's award on several distinct grounds, some of which have been already disposed of in the course of the argument. So far as respects the adjudication that the defendants were entitled to prove under the estate of the bankrupt a debt of 8017*l.*, we have given our opinion that that part of the award must be set aside. The right of the defendants to prove any debt, or the amount of the debt which (if any) they were entitled to prove under the bankrupt's estate, cannot be considered as a matter in dispute between the assignees and the defendants. Other parties are interested in those questions, behind whose backs it would be impossible for the assignees and the

(a) May 6. Lord Lyndhurst was sitting in equity.

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defendants to determine them. We think therefore that the arbitrator had no right to adjudicate on that matter at all; as he himself indeed appears to have thought by the terms in which he has cautiously worded that part of his award. That part of the award must therefore be set aside, in order that, if necessary, the case may go before the commissioners without prejudice from the judgment of this court either way.

Another objection taken to the award on moving for the rule was, that the arbitrator ought to have found that the plaintiffs were entitled to recover from the defendants the amount of the extra work done by the bankrupt: however, as the extra work was still work done under the contract, which actually provides for it, and as the work done under the contract has been over paid, this objection could not be supported, and has been abandoned by the learned counsel for the plaintiff.

But the principal question in the case is, whether the plaintiffs are entitled to have the verdict increased from one shilling, to 5173*l.* the amount of the machinery and materials, or whether, as to that, the defendants were entitled to insist on a lien given to them; and we are of opinion that the arbitrator was warranted in arriving at the conclusion he did upon this part of the subject. The learned baron, after stating the facts found in the award, added, that up to the time when the advances were made by the defendants, they, on the one hand, had no property in the materials brought on their premises by *Streather*, which he might take away and change at pleasure; while, on the other hand, he had no exclusive possession of the land on which they were placed, so as to support trespass. He afterwards applied to the defendants for advances, and, by way of inducement, pointed out and enumerated the machinery, &c. brought by him to and

then lying upon their premises. Large advances were then made to him by the defendants, on the clear understanding of both parties that the machinery and materials on the premises were to be a security for them. What then is the effect of the agreement between these parties? At first it was said that it transferred the property in the machinery and materials, so as to occasion a question to arise on the construction of 6 *Geo. 4. c. 16. s. 72.* as to the apparent ownership by the bankrupt. Upon the terms of the letters, joined with the nature of the subsequent enjoyment, I certainly should have thought that if the property had passed, the assignees would have had no claim on the ground of apparent ownership; for directly the materials &c. were placed on the premises, they were only subject to the special use of the bankrupt, which was the case of *Collins v. Forbes (a)*. But the effect of the agreement clearly was, not to transfer to the defendants the property in the articles placed on their premises, but to give them a lien on them. And the only real question has all along been, whether there has been such a possession by the company as would support that lien? and I am of opinion that there has. It is impossible to lay down any precise rule as to the sort of possession which is requisite to give validity to a lien, and each case must principally depend on its own circumstances; but here the defendants had a possession which was not more equivocal or less exclusive than the nature of their transaction with *Streather* required. Had they taken any possession more strictly exclusive, the whole object of making the advances, to secure which the lien was given, would have been defeated. It would be going too far to say that the law rendered such exclusive possession necessary; and the case of *Manton*

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(a) 3 T. R. 316, 322.

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v. *Moore* (a), though not exactly on the same subject, is however worthy of consideration, as showing that it is not required by the law. Though *Streather* has been permitted to use the engines and materials for a particular purpose, they remained on the defendants' premises, and under their control. On the whole, but principally on the language of the letters, I agree with the arbitrator that the defendants were entitled to the benefit of a lien as to all the machinery and materials brought on the premises before *Streather* became a bankrupt. But as it appears that a considerable quantity of materials were brought on the premises by the bankrupt after the act of bankruptcy, the lien would not extend to them; for when so brought, they were in truth the property of his assignees, the plaintiffs. The learned arbitrator has however found that the company is entitled to retain even these materials on another ground, viz. that all of them were supplied on the credit of the company, and paid for by them. But it appears from the affidavits that the fact was otherwise, and we think that the defendants cannot retain that part. It was argued, that as payments were made to *Streather* by the company subsequently to the time when those materials were brought on the premises, and more than sufficient in amount to countervail the value of them, the defendants are entitled to consider them as in fact paid for, and that they may therefore retain them under an equitable construction of 6 Geo. 4. c. 16. s. 82. But we are of opinion that the payments in question cannot be considered as payment for these particular goods in the course of business, but merely as general advances; and that being so, the claim made to protection under section 82 cannot here be supported.

(a) 7 T. R. 67.

BOLLAND B.—I concur. *Manton v. Moore* very closely resembles the present case. The difficulty which there arose from the bill of sale, is here presented by the terms of the letters.

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ALDERSON B.—I think that under the circumstances the arbitrator has drawn the right conclusion in inferring that the defendants' possession was sufficient to support the lien. As to proof under the commission, it not being a matter in difference between the parties, the arbitrator had no right to decide on it; but it was prudent in him to include it as he has done, because had he in our opinion possessed that authority over it which we hold that he has not, the entire omission of it by him would have been a reason for setting aside the award altogether.

GURNEY B. concurred.

Rule absolute to set aside that part of the award which directed the proof under the bankrupt's estate, and to increase the damages by adding the value of the goods brought on the premises after the act of bankruptcy, and not supplied on the credit of or paid for by the defendants. As to the residue, rule discharged.

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GUNN against M'CLINTOCK.

A defendant arrested on mesne process in *Ireland* put in special bail there, and was afterwards arrested in *England* in an action on the judgment obtained in the first action : Held, that he was entitled to be discharged out of custody, though the special bail put in in *Ireland* had been discharged for a defect in the affidavit to hold to bail.

THE defendant had been arrested in *Ireland* for the amount of several bills of exchange, and put in special bail, who were afterwards discharged on entering a common appearance, but on what ground was not shown to the court on the affidavits used on showing cause. After judgment had been obtained against him in the *Irish* court of Exchequer, he was arrested in *Kent* in an action on that judgment.

Mellor moved to discharge him out of custody on filing common bail, on the ground that he had been arrested twice for the same cause of action, and that after being arrested in the original action, he could not be arrested again in the action on the judgment. He mentioned a case of *Sydney v. O'Gorman Mahon*, in which the defendant being arrested in an action brought here on an *Irish* judgment, was discharged by *Little-dale J.* A rule having been granted,

G. Henderson for the plaintiff showed cause. Unless it is clearly shown that the plaintiff has the same security for his demand in the county where the first arrest took place, with equal advantages in prosecuting his suit there, which he has here, the rule *nemo debet bis vexari pro eadem causâ* does not apply. In *Maulé v. Murray* (a) the defendant was arrested in *America*, and judgment had been obtained against him there. On his being again arrested here for the same demand, the court refused to discharge him, adopting the reasoning of counsel, that the court would not take notice of an arrest in a foreign country, and that it would be unjust

(a) 1 T. R. 470; see Tidd, 9th ed. 176.

to deprive the plaintiffs of what was perhaps their only security for the payment of their debt. In *Imlay v. Ellefsen* (a) the plaintiff held the defendant to bail for the same cause of action for which he had been previously arrested in *Norway*, and as it did not distinctly appear to the court that the plaintiff had the security of bail there, so as to have the same benefit of prosecuting his suit there as here, the court refused to take from the plaintiff the benefit he was entitled to by the laws of this country. In *Naylor v. Eagar* (b), though an attachment had issued against the defendant's goods in *New South Wales*, still as it was not known whether bail were put in to the action, or whether the goods &c. were rendered in execution to the plaintiffs, the court refused to discharge the defendant, as it did not appear clearly that the plaintiffs had the same remedy in the colony as they might have here. Now here the plaintiff has not the same security of bail in *Ireland*, for they have been discharged.

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Mellor in support of the rule. The practice of the *Irish* courts is well known, so that *Imlay v. Ellefsen*, where the court did not know whether by *Norwegian* law the plaintiff had the same benefit of bail which he had here, does not apply. *Maule v. Murray* may be disposed of by a like observation. The discharge of the bail in *Ireland* on entering a common appearance must be taken to have arisen from the plaintiff's laches, so that the authority of *Bower v. Barnett* (c) is untouched, which lays down that in an action of debt on a judgment, whether after verdict or by default, the defendant cannot be arrested, if he was arrested in the original action.

(a) 2 East, 453.

(b) 2 Y. & J. 90; see *Wood v. Thompson*, 5 Taunt. 851.

(c) Sayer's Rep. 160; Tidd's Prac. 9th ed. 177.

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Lord LYNTHURST C. B.—I am of opinion that this defendant should be discharged on filing common bail. If the security of bail in *Ireland* had continued, the defendant would not have been liable to a second arrest here; and if, on account of the bail having been discharged in *Ireland*, that security does not continue there, he ought not to be put in a different situation, unless that discharge be shown by the plaintiff to have taken place from no fault or laches of his own; a cause which may have influenced the *Irish* court as it would have done this. However, the motion may stand over at the plaintiff's expense, to ascertain that fact, and file an additional affidavit by to-morrow.

It afterwards appeared that the discharge of the bail in *Ireland* had taken place for a defect in the affidavit of debt.

Rule absolute.

FYSON *against* KEMP.

Seemle, a motion to set aside a declaration and subsequent proceedings for irregularity, is too late if seven days in full term have elapsed since the irregularity; and it is at all events too late after the plaintiff has taken another step by demanding a plea.

THE process was serviceable only. The declaration was filed conditionally, and notice of such filing was given on 15th *April*, but the appearance was not entered till the 16th. On the 18th the plaintiff demanded a plea. On the 22d a rule was obtained by *Hoggins* to set aside the declaration and subsequent proceedings for irregularity with costs. Cause was shown that the application came too late, being made a week after the irregularity, and also after a step taken. *Richards* supported the rule, on the ground that it was made within the time for pleading, which did not expire till the 23d.

LORD LYNTHURST C. B.—Were this only a question of time, we think that the interval of seven days in full term is too long; but the defendant should at all events have applied before any other step was taken in the cause, however short the interval.

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PARKE B.—It does not appear to me that seven days are that reasonable time within which the defendant is bound to apply; at all events he should have come before the next step.

Rule discharged.

CRESSWELL against CRISP.

DEBT on a promissory note by payee against maker.
Demurrer to the declaration.

N. G. Clarke moved on *Reg. Gen. Hil. 4 Will. 4. No. 2.* [this Vol. p. i.] to set aside the demurrer for a frivolous statement in the margin of the matter of law intended to be argued, and to be at liberty to sign judgment. The statement objected to was, that the action being in debt, it did not appear that the note was expressed to be for "value received," nor any thing equivalent thereto, and that therefore debt would not lie.

Debt against the maker of a promissory note. Demurrer stating in the margin that the note was not expressed to be "for value received." Held, not so frivolous as to warrant its being set aside on motion as irregular under *Reg. Gen. Hil. 4 W. 4. No. 2.*

R. V. Richards showed cause. In *Bishop v. Young* (a) the declaration was in debt by the payee against the maker of a note; and in *Priddy v. Henbrey* (b), the same form of action was adopted by a

(a) 2 Bos. & P. 78.

(b) 1 B. & Cr. 674.

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drawer of a bill against the acceptor, and in both cases the declarations were upheld only on the ground that the note and bill were stated to have been given for "value received."

N. G. Clarke contra. In *White v. Ledwich* (a) a declaration on a bill was demurred to because it was not stated to have been given for value received, but the court held it unnecessary, and the judgment was for the plaintiff. The new forms of declarations on bills and notes promulgated in *Trinity* term 1 *Will.* 4. do not contain the words "value received."

LORD LYNDEHURST C. B.—The plaintiff may proceed either in *assumpsit*, to which action the precedents mentioned apply, or in debt. If he elect the latter form of action he must pursue the terms of an ordinary declaration in it. The general rule (b), which was intended to prevent a declaration in debt on a bill or note from exceeding in length the forms given by the schedule annexed, relates only to costs. The cases cited show that the matter of law raised is certainly not so frivolous as to warrant us in setting aside this demurrer.

PARKE B.—We ought not to determine this point on motion.

Rule discharged.

(a) K. B. *Hil.* 25 G. 3. Bayley on Bills, 4th ed. 34. *notis.* It does not appear whether the action was in debt; *Macleod v. Sae*, Lord Raym. 1481, there cited as S. P. was in *assumpsit*.

(b) *Trinity* 1 *W.* 4. Vol. I. 525.

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WALKINSHAW *against* MARSHALL and Another.

THE defendants in this and two other actions by the same plaintiff, obtained two orders for a week's time to plead on the usual terms, and delivered their pleas on 28th *November*. On 26th *November* their attorney offered the plaintiff 50 per cent. on the debt, and on 7th *December* the plaintiff offered to take 75 per cent. On the 10th *January* the plaintiff was gazetted a bankrupt; on the 29th the issue was delivered; and on the 31st, the last day of *Hilary* term, *Maule* for the defendants obtained a rule for security for costs from the assignees (a).

Coleridge Serjt. showed for cause, first, that the time to plead obtained by the defendant had prevented the plaintiff from trying his cause before the bankruptcy, and also that the motion came too late on the 31st *January*, after the bankruptcy had been gazetted on the 10th.

Per Curiam (b).—The ground for this application was the change of the plaintiff's circumstances during the progress of the cause, and the question is, whether the defendants have come too late after they had intelligence of that change? One of the "usual terms" imposed on giving time to plead is, that the defendant shall take short notice of trial, and if the plaintiff had been active he might have gone to trial at the sittings after *Michaelmas* term. He does not do so, and becomes bankrupt before he can go to trial. The

Where a plaintiff becomes bankrupt before the trial of a cause, the defendant cannot apply for security for costs till he has ascertained that the assignees have resolved to proceed with the action.

A plaintiff declared in time to go to trial at the sittings in *Michaelmas* term, had not two orders for time to plead been obtained. As the "usual terms" were imposed, viz. inter alia the accepting short notice of trial, the plaintiff might still have gone to trial at the sittings after that term, but did not. On the 10th *January* he appeared in the Gazette as a bankrupt, and on the 29th the issue was delivered: Held, that an application for security for

costs from the assignees, made on the 31st *January*, was in time.

(a) See 7 T. R. 296. 3 M. & Sel. 283. 6 Taunt. 123. 1 Marsh. 4. and 477. 4 D. & R. 81. 2 B. & Cr. 579. 2 D. & R. 423. 2 Taunt. 62. 2 Chit. R. 150, 359; *Mason v. Polhill*, (E. 1833.) ante, Vol. III. 595.

(b) Lord Lyndhurst C. B., *Parke, Bolland, Alderson, Bs.*

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simple fact of his becoming bankrupt does not entitle the defendants to security for costs, for the first moment at which they can apply for such security is after ascertaining that the assignees have resolved to go on with the action. The assignees might put a stop to the action if the bankrupt proceeded with it, but not for their benefit.

Rule absolute.

PRYBUS *against* BRYANT.

The writ of summons was against *Andrews Bryan* in "an action on promises," and the defendant's name was similarly spelt in the distringas; but in the copy of the writ of summons served on the defendant the name of *Andrews* was stated to be *Andrew* :

Held, that the distringas must stand, for the service of the copy was not made in pursuance of 2 *W. 4.*

c. 39., but according to the practice of the court :

Held, also,

that the distringas being "in a plea of trespass on the case on promises," will not be set aside, though the writ of summons was "in an action on promises."

A Rule had been obtained by *Dunbar* to set aside a writ of distringas and subsequent proceedings, and calling on the plaintiff to pay back 2*l.* paid under the distringas, on the ground that a true copy of the writ had not been served. The writ stated the defendant's name to be *Andrews Bryan*, the copy had it *Andrew Bryan*. *Erle* was about to show cause for the plaintiff but was stopped by the court, who asked what the irregularity was? It was answered that the name on the copy was not identical or *idem sonans*, and that 2 *Will. 4. c. 39.* was not complied with.

PARKE B.—The writ of summons and the distringas both stated the defendant's name correctly. The copy of the writ of summons which was served gave the defendant all the information which he could require, and could not mislead him. Service of such a copy was sufficient for the purposes of obtaining a distringas.

The service of the copy was not made under sect. 4. of 2 *Will. 4. c. 39.*, which directs the copy of a *capias*

to be delivered to a party, but according to the practice of the court relating to serviceable process.

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ALDERSON B.—The practice of the court is, to leave a copy of a writ of summons at the defendant's residence. Now it is one thing not to comply with the practice, and another to do a thing contrary to the act.

It being urged that the writ of summons was "in an action on promises," and the distringas "in a plea of trespass on the case on promises," the court refused to entertain the objection, the respective forms in the schedule of 2 Will. 4. c. 39. having been followed, and discharged the rule with costs.

PRIMROSE against BRADLEY.

THE plaintiff, a *London* attorney, sent a writ in a letter by post to *Paine*, an attorney at *Dover*, who was deputy constable (or bodar) of *Dover* castle, with directions to get the same executed. The master allowed him on taxation 4s. for the warrant, and 6s. 8d. for attending for it and instructing the officer. *Mansel* obtained a rule to review the taxation, and return the money, on the ground that the charges allowed exceeded those given by 23 H. 6. c. 9., and also that *Paine* acted as under-sheriff.

Channell showed cause. It is not clear that *Paine* is an "officer" within 23 H. 6. c. 9.; but at all events his charges are not made in that character, but as special agent of the plaintiff, so that they are not only

to execute it, the Court affirmed the taxation, though the fees were above those allowed by 23 H. 6. c. 9.

The plaintiff, a *London* attorney, sent a writ in a letter to a *Dover* attorney, who was also deputy constable or bodar of *Dover* castle, in order to get it executed, and afterwards taxed the bill of the latter. The master having allowed 4s. for the warrant, and 6s. 8d. for attending with it and instructing the officer

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recoverable by action, but being those usually paid and allowed on taxation, were properly allowed to *Paine* in this case. *Townsend v. Carpenter* (a), and *Foster v. Blakelock* (b).

Mansel contra, relied on *Dew v. Parsons* (c).

LORD LYNTHURST C. B.—That was a simple case. A sheriff claimed as of right a larger fee for his work and labour on a warrant issued by him in the execution of his office, in a cause in which the defendant was attorney, than he was entitled to by 23 H. 6. c. 9., and the court held that the defendant might maintain an action for the overplus as for money had and received, or might set it off in an action against him by the sheriff. But to bring the sheriff or his officer within the act, there must not be imposed on him any other duties beyond those to which he is liable in his official capacity. This plaintiff has by his own acts, in the mode of delivering the warrant, taken this officer out of the strict letter of the statute, whilst by taxing his bill he recognized him as his agent, and not as an officer only. The rule, therefore, should be discharged, and the plaintiff left to any other remedy he may have under 23 H. 6.

PARKE B.—The process was sent to *Paine* in a letter, so that besides the postage, which may have been separately allowed, he had the trouble of reading it and acting on its instructions. If the charges are made by *Paine* as an officer of the constable of *Dover* castle, we cannot deal with it by taxing it as an attorney's bill, according to this motion.

(a) 1 Ryl. & M. 314, 1825.

(b) 5 B. & Cr. 328, (1836.)

(c) 2 B. & Ald. 562, (1819.)

ALDERSON B.—We were called on to review this taxation, on the ground that it was the bill, not of an attorney, but of a sheriff's officer. Were that so in fact, we could not deal with it, nor could it have been referred to taxation except as an attorney's bill. *Paine* is in the first instance treated as an agent, and it is then sought to turn round and treat him as an officer within 23 H. 6.

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Rule discharged with costs.

WILSON and Another *against* KING.

THIS cause had been referred to a barrister to make his certificate. He certified that a verdict should be entered for the plaintiffs for a sum named. *Humfrey* obtained a rule to set aside the certificate and verdict as being against law. He sought to distinguish a certificate from an award, on the ground that the arbitrator cannot state facts for the opinion of the court on the former; contending that objections might therefore be taken to one, which could not be available against the other.

Where a cause is referred to a barrister with power to certify only, his certificate cannot be set aside on the ground that he has mistaken the law.

Quere, if an arbitrator, having only such limited power, may deliver in with his certificate a written paper stating facts proved before him, so as to raise a question of law for the opinion of the court?

Whitehurst in support of the certificate showed cause. One ground of this motion is, that an unstamped paper offered in evidence was rejected by the arbitrator. [*Alderson* B. Is that an objection to the award?]

PARKE B.—I consider it to have been long ago settled by the case of *Campbell v. Twemlow* (a), that the parties who submit to the award of an arbitrator are bound by his opinion, both as to law and fact (b). No

(a) 1 Price, 81.

(b) *S. P. Ferriman v. Steggall*, 9 Bing. 681.

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objection appears on the face of this certificate. If the limited power of such an arbitrator prevents him from stating a point of law as he could have done, had the reference empowered him to make an award, that only proves that the parties have themselves selected a mode of reference which may or may not be liable to that inconvenience.

BOLLAND B. concurred.

ALDERSON B.—In *Holmes v. Higgins* (a), the arbitrator delivered a written paper with his award, in order to raise a point of law for the opinion of the court, and the court set aside the award upon the facts stated in that paper.

GURNEY B. concurred.

Rule discharged with costs (*May 1.*) (b)

(a) 1 B. & Cr. 81. It probably was not one of the terms of that reference that the arbitrator should be at liberty to state facts in his award for the opinion of the court in point of law.

(b) In *Wade v. Malpas*, which was heard on *May 6*, and which was a reference similar in its circumstances, *Godson* had obtained a similar rule, on the ground of the arbitrator, a barrister, having made an award against law and fact.

Telford Serjt. and *Grenes* showed cause.

Godson used the same argument against the certificate as in the last case. The Court alluded to *Campbell v. Tenslow*, and having mentioned their late decision in *Wilson v. King*, discharged the rule with costs; *Alderson* B. adding, that the court in *Wilson v. King* held the certificate to be for this purpose an award; and that had the arbitrator wished for the opinion of the court, he might have stated the facts, in order to obtain it.

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ASSUMPSIT. The declaration was framed before the new rules of *Hil.* 1834, and contained special counts for not delivering goods according to agreement, for not accounting for goods sold, and for not returning goods unsold. The plaintiff had a general verdict, subject to a reference to a barrister, who certified generally, that a verdict should be entered for the plaintiff for 5*l.*, without restraining the verdict to any particular count. *Petersdorff* obtained a rule to enter a suggestion on the *London* court of requests act, 39 & 40 *G. 3. c. civ.* in order to deprive the plaintiff of costs, or to stay proceedings on payment of 5*l.*

The *London* court of requests acts confer jurisdiction over liquidated demands, though there are special counts; but not in cases where unliquidated damages are sought to be recovered; as *e. g.* on a count for not returning goods unsold.

Bompas showed for cause that the acts 3 *J. 1. c. 15.*, 14 *G. 2. c. 10.*, and 39 & 40 *G. 3. c. civ.* applied only to suits for debts not exceeding 5*l.*, and not to actions of special assumpsit for unliquidated damages. *Jonas v. Greening* (a).

Petersdorff in support of the rule. The argument on the other side would confine the jurisdiction of the *London* court of requests to indebitatus assumpsit. But nothing in the acts excludes from their beneficial operation, actions where special counts are used. Were it otherwise, actions on bills would be excluded. In *Sandby v. Miller* (b), it was held that these acts applied where the plaintiff recovered less than 5*l.* on a count in assumpsit on a quantum valebant. Here the counts, though special in form, amount to little more than the common count for the value of goods. *Jonas v. Greening* was an action on the case for non-delivery

(a) 5 *T. R.* 529, and see *Tidd*, 9 ed. 954.(b) 5 *East*, 194.

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of goods according to a contract, and not to recover the value of the goods. The damage which there accrued from non-performance of the contract made, depended on an uncertain event. So here the reference showed the subject-matter of suit was rather one of arithmetical calculation, than of uncertain damages.

PARKE B. (2 May.)—I think that the jurisdiction of the *London* court of requests is not confined to actions of debt or indebitatus assumpsit, but extends to liquidated demands. In this case the count for not accounting for goods sold, might be such a liquidated demand. But there is also a count for not returning goods unsold, which cannot be so considered. As the arbitrator has certified that a verdict should be entered generally for the plaintiff, it must be taken that part of the damages was given on that count as well as the others. Had the defendant procured the arbitrator to confine his award to those counts in which the demand was liquidated, the result might have been different.

The other Barons concurring,

Rule discharged, the costs to be costs
in the cause.

GRANGE *against* SHOPPEE.

Motions for
new trials
after writs
of trial under 3 & 4 *Will.*

AT the trial before one of the secondaries of *London* under a writ of trial, pursuant to 3 & 4 *Will.* 4. of trial under 3 & 4 *Will.* 4. c. 42. s. 17., should be made on an affidavit, verifying the notes of the presiding judge annexed thereto, to be his notes, without further affidavits.

c. 42. s. 17., the defendant had a verdict, which *Thesiger* now moved to set aside, and to enter a verdict for the plaintiff for 5*l.* or for a new trial. The secondary had given leave to move to enter a verdict, and gave his certificate to delay execution till the plaintiff could apply to the court. Affidavits of what took place at the trial were produced, as were also the secondary's notes, but the latter were not verified by affidavit.

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Lord LYNTHURST C. B. (*April 16.*)—The judges yesterday settled that applications of this kind, consequent on trials before sheriffs and other officers, under writs of trial, should be made on producing the notes of the presiding judge, verified by affidavit to be his. The counsel may move; but the rule, if granted, must not be drawn up till the secondary's notes are thus verified. The case may then come on as a motion, without being put into the new trial paper.

A rule having been granted, was drawn up after the notes had been verified by affidavit.

See *Mangfield v. Brearey*, 1 Adol. & Ell. R. 347.

HELLINGS, Administrator, *against* STEVENS.

BUSBY had obtained a rule for a new trial after the defendant had obtained a verdict on a trial before a secondary of *London*, on a writ of trial. The officer had hesitated to draw it up, doubting whether the affidavit sufficiently authenticated the paper A. annexed to it, and purporting to be notes of the trial signed by the secondary, to be the notes of that officer. It was made by the managing clerk to the defendant's attorney, and stated that the paper writing thereto annexed marked A., purporting to be a copy of the

The affidavit verifying the sheriff's notes of a trial had under a writ of trial, pursuant to 3 & 4 Will. 4. c. 42. s. 17., need only state that the paper annexed contains the notes sent by the sheriff to the court.

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secondary's notes, taken on the said trial, was received by the deponent from the said Mr. J. the secondary, who acknowledged that the signature I. J. to the paper writing thereunto annexed, was his the said Mr. J.'s signature. It then proceeded to state that the deponent could not swear that such paper writing was a true copy of the notes so taken on the trial, because his objections made at the trial were not stated &c.

Lord LYNTHURST C. B. (23 April.)—The rule must be drawn up, for the first part of the affidavit is sufficient, and the latter part is merely surplusage. The party was not bound to swear that the copy of the notes received from the secondary was a correct copy of those taken by him at the trial, but merely that the paper annexed contained the notes transmitted by him to this court.

Rule drawn up accordingly (a).

(a) See ante, 270.

FOWLER *against* HENDON.

If a notice of dishonour is sent by post on the day on which the party ought to receive it, the onus is on the vendor to prove affirmatively, that the letter was put in in time to reach the party that day according to the course of the post.

ASSUMPSIT on a bill of exchange, by indorsee against indorser. At the trial at the sittings in *Easter* term, it appeared that the notice of non-payment of the bill ought to have been given on the 7th *November* by the plaintiff to the defendant, both residing within the limits of the twopenny post. The plaintiff proved a letter containing the notice to have been put into a twopenny post office by daylight on that day, and within office hours, which ended at six o'clock. The judge left it to the jury to say whether there was not reasonable evidence that the notice came to the defendant's hands on the 7th. The plaintiff had a ver-

dict on a plea of the statute of limitations. *Mansel* moved for a new trial, and cited *Smith v. Hallett (a)*. [Lord *Lyndhurst* C. B. The plaintiff should have proved that the notice was put in at such an office hour, that in the ordinary course of the post a letter would reach the address on the 7th.] A rule having been granted,

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Chilton showed cause.

PARKE B. (12 June.)—We think there must be a new trial, and that the learned judge's direction was wrong. The plaintiff was bound to prove the letter to have been put in in time to have been delivered the same night. No evidence was given of the course of the post, or where the letter was put in. Had it been put in in the general twopenny-post office, it might have been put in in time; but if elsewhere, the contrary. The burthen of that affirmative proof was on the plaintiff. The other barons concurring,

Rule absolute.

(a) 2 Campb. 208.

HEWITT *against* W. MELTON.

CASE. The first count stated, for that whereas The attorney for a defendant who was in custody on the plaintiff heretofore &c., before the barons of final process, obtained the consent of the plaintiff's attorney not to charge him in execution in the term in which that step ought to have been taken, on the false representation that he had the defendant's authority and consent to take no advantage of his not being charged in execution till the next term. The defendant's attorney signed an undertaking to that effect, which, however, did not state that the proceedings were stayed at the defendant's request, pursuant to *Reg. Gen.* of this court, *Hil. 36 & 37 G. 2*. The defendant was not charged in execution till the next term, and was afterwards discharged on the ground of the above omission in the undertaking. An action having been brought by the plaintiff against the defendant's attorney for damages accruing from the defendant's discharge by the false representation of the defendant, it was held that it could not be maintained, for the damage laid arose from the informality of the undertaking.

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his majesty's Exchequer at *Westminster*, in a certain action then depending in the said court at the suit of the plaintiff against one *T. B. Melton*, recovered against the said *T. B. M.* a judgment for a certain sum of money, to wit, the sum of 1000*l.* for damages and costs, as by the said judgment recovered in the said court of oursaid lord the king before the barons &c. more fully appears, and which said judgment, before and at the time of committing the grievances by the defendant hereinafter next mentioned, was and still is in full force &c.: And whereas, after the recovering the judgment aforesaid, and whilst the same was in full force &c., to wit, on &c., in *Michaelmas* term in the third year &c. the said *T. B. M.* was rendered to the custody of the warden of his majesty's prison of the *Fleet*, in discharge of his bail at the suit of the plaintiff in the said suit in the said court of Exchequer, and at the time of committing the grievances by the defendant in this suit, as hereinafter next mentioned, was a prisoner in the custody of the said warden of his majesty's prison of the *Fleet*, at the suit of the plaintiff in the said suit in this said court of Exchequer, and the said *T. B. M.* having been so rendered to and so being a prisoner in the custody of the said warden of his majesty's prison of the *Fleet* aforesaid, it became and was essential and necessary, by and according to the course and practice of his majesty's said court of Exchequer, for the plaintiff to cause the said *T. B. M.* to be duly charged upon the said judgment before the expiration of a certain time, to wit, before the end and expiration of *Hilary* term then next ensuing, to wit, *Hilary* term in the third year aforesaid, and the plaintiff by *R. H.* who was then and there his attorney in the said suit in the said court of Exchequer, was minded and desirous and was about so to duly charge, and but for false, fraudulent and deceitful representations of the said defendant,

hereinafter mentioned, would have so duly charged the said *T. B. M.* in execution at the suit of him the plaintiff upon the said judgment; of all which premises the said defendant, before the committing the grievances hereinafter next mentioned, had notice: And whereas afterwards after the recovering of the said judgment, and whilst the same was in full force, and after the said *T. B. M.* had been so rendered to and whilst he was a prisoner in the custody of the said warden of his said majesty's prison of the *Fleet* as aforesaid, and whilst the plaintiff was so about to charge the said *T. B. M.* in execution of the said judgment, and before the expiration of the necessary time for so doing, and before the expiration of the said *Hilary* term in the third year aforesaid, to wit, on the 25th *January* 1833, the said 25th *January* 1833 aforesaid then and there being a day in and before the end and expiration of the said *Hilary* term in the third year aforesaid, the said defendant then being one of the attornies of his said majesty's court of Exchequer, and also the attorney of and for the said *T. B. M.* in the said suit, applied to and requested the said *R. H.* as being the attorney of and for him the said *J. Hewitt* the plaintiff in the said suit, and also the plaintiff in this suit, for the said *J. Hewitt* not to charge, and that he would not charge the said *T. B. M.* in execution in the said then *Hilary* term in the third year aforesaid, nor until the then next *Easter* term: and the plaintiff further says, that the said defendant contriving and fraudulently wickedly and deceitfully intending to deprive the plaintiff of the benefit and fruits of his said judgment against the said *T. B. M.* and the means of recovering and enforcing the payment of the said damages and costs so recovered by the plaintiff against the said *T. B. M.* by the said judgment as aforesaid, then and there, to wit, on the 25th *Ja-*

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January 1833, falsely, fraudulently, wickedly and deceitfully represented, pretended and asserted to the said *R. H.*, so then and there being the attorney of and for the plaintiff in the said suit in which the plaintiff had so recovered the said judgment as aforesaid, and that he the said defendant was then and there authorized by the said *T. B. M.* to make such application and request to the said *R. H.*, so then and there being attorney of and for the plaintiff in the said last-mentioned suit, and that he the said *W. M.* was then and there authorized by the said *T. B. M.* to sign and deliver to the said *R. H.* so then and there being attorney of and for the plaintiff in the said last-mentioned suit, a certain undertaking in writing, then and there signed and delivered by the said defendant as the attorney of and for the said *T. B. M.* in the said last-mentioned suit to the said *R. H.* as attorney of and for the plaintiff in the said last-mentioned suit; whereby he the said *W. M.* so being attorney of and for the said *T. B. M.* in the said suit, consented that the plaintiff should have until the then next *Easter* term to charge the said *T. B. M.* in execution at the suit of the plaintiff upon the said last-mentioned judgment, and to take no advantage of his the said *T. B. M.* not being charged in the said *Hilary* term, it being then and there agreed that the said plaintiff should have until the then next *Easter* term to do it in, meaning to charge the said *T. B. M.* in execution upon the said judgment; and the plaintiff further says, that thereupon the said *R. H.* so then and there being the attorney of and for the plaintiff in the said suit, confiding in the said assertions and representations of the said *W. M.*, and believing the same to be true, and not knowing to the contrary thereof, did then and there take and accept the said consent and undertaking in writing, and did forbear and omit

to charge the said *T. B. M.* in execution at the suit of the plaintiff upon the said judgment, on or before the end or expiration of the said *Hilary* term in the third year aforesaid, or within a due and proper time in that behalf, as he could and might and otherwise would have done, whereas in truth and in fact the said *T. B. M.* was not at the time he made such application and request as aforesaid to the said *R. H.* so being the attorney of and for the said plaintiff in the said suit, and made such assertions and representations to the said *R. H.*, or afterwards, authorized or empowered by the said *T. B. M.* to make such request and application: And whereas in truth and in fact the said *W. M.* was not, at the time he so signed and delivered to the said *R. H.* so being attorney of and for the plaintiff in the said suit as aforesaid, the said undertaking or consent in writing as aforesaid, and made such assertion and representation in that behalf as aforesaid, or afterwards, authorized or empowered by the said *T. B. M.* to sign or deliver the same to the said *R. H.* so being the attorney of and for the plaintiff in the suit aforesaid, or to the plaintiff in the suit aforesaid, or to give any other valid or sufficient undertaking for the plaintiff to have until the said then next *Easter* term to charge the said *T. B. M.* in execution upon the said judgment, and to take no advantage of the said *T. B. M.* not being charged in execution the said then *Hilary* term: And the plaintiff further says, that the said *T. B. M.* took advantage of the plaintiff not having charged or caused him the said *T. B. M.* to be charged in execution upon the said judgment before the end and expiration of the said *Hilary* term, and afterwards, to wit, on the 17th of *April* in *Easter* term, in the third year aforesaid, made, and caused to be made, application to the said court of Exchequer to be discharged out of custody at the suit of the plaintiff in

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the said suit, for and by reason of the said plaintiff in the said suit not having charged, or caused to be charged, him the said *T. B. M.*, in execution upon the said judgment, before the end and expiration of the said then last *Hilary* term, as according to the course and practice of the said court he ought to have done, and the said *T. B. M.* was, upon and in consequence of such application, afterwards, to wit, on the 2d of *May* in the same *Easter* term, in the third year aforesaid, by and in pursuance of a certain rule or order of the said court, made in the said court on 2d *May* in *Easter* term, in the third year aforesaid, discharged out of custody of the said warden of the *Fleet* at the suit of the plaintiff, not having charged, or caused to be charged, the said *T. B. M.* in execution upon the said judgment within the said time in that behalf aforesaid, and which the said *R. H.* so being attorney of and for the plaintiff in the said suit, forbore and omitted to do, by, from, and in consequence of the said false, fraudulent and deceitful representations and assertions of the said defendant, and the belief and confidence of him the said *R. H.* in the same, and by means of the premises the plaintiff lost all benefit and advantage of and from the said judgment so recovered by him against the said *T. B. M.* as aforesaid, and the means of obtaining or recovering payment or satisfaction for the damages and costs aforesaid, or any part thereof, to wit, in the county aforesaid. The general issue was pleaded before the rules of *Hil. 4 W. 4.* came into operation.

At the trial at the *Middlesex* sittings in *Trinity* term 1834, it appeared that the defendant acted as the attorney of *T. B. Melton*, his father, who was imprisoned in the *Fleet* on final process at suit of the plaintiff,

and would have been supersedable if not charged in execution in *Hilary* term 1833 (a). On the 25th *January*, the defendant being at the office of the plaintiff's attorney, saw there a habeas corpus which had been got ready in order to bring up *T. B. Melton* to be so charged. Defendant told the plaintiff's attorney that that course would expose his father and bring in detainers, and begged that he would not charge him till *Easter* term. The plaintiff's attorney agreed to do so, if he could procure his father's consent not to take any advantage on that account. The defendant then left the office, as he said, to see his father on the subject. He afterwards returned there, representing that he had his father's consent and authority, and immediately, before quitting the office, wrote out the following memorandum and consent: — "Exchequer of Pleas, *Hewitt v. Melton*. I hereby consent that the plaintiff shall have till next term to charge the defendant in execution, and to take no advantage of his not being charged in execution this term, it being agreed that the plaintiff shall have until next *Easter* term to do it in. *W. Melton*, defendant's attorney. *January 25, 1833.*" *T. B. M.* was not charged in execution in *Hilary* term, but afterwards applied to a judge at chambers for his discharge. The case was adjourned for the consideration of the court, who, in *Easter* term 1833, discharged the prisoner, on the ground that the above consent did not state that proceedings were stayed at the request of the defendant in the suit, according to *Reg. Gen.* of this court, *Hil. 26 & 27 Geo. 2. s. 11.* [*ante*, Vol. I. App. No. I. p. xiv.] (b). The affidavits in sup-

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(a) See as to the proper time for charging a defendant in execution in the Exchequer, *Reg. Trin. 26 & 27 Geo. 2. s. 11.*, *ante*, Vol. I. Appendix, No. I. p. xiv.; and in *K. B. Reg. Hil. 26 & 27 Geo. 3.*; Tidd, 9 ed. 360, 367; 2 Archb. K. B. Prac. 124.

(b) See the case reported, *ante*, Vol. III. p. 503.

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port of that discharge stated that *T. B. Melton*, the father, did not know of the undertaking given by the son, and had never given him authority to enter into it. It was objected at the trial that the injury complained of arose from the defect in the undertaking, and not from the false representation which was stated in the declaration to have been made by the defendant. *Vaughan B.* reserved the point. The plaintiff had a verdict, and the court afterwards granted a rule for a nonsuit or new trial.

Mercwether Serjt. and *Platt* showed cause. The ground of the discharge of *T. B. Melton* was, that he was not charged in execution in *February term 1833*. Now the reason that he was not so charged was the false representation of the defendant that he had the prisoner's consent and authority that such charging in execution should be postponed to the next term. [*Alderson B.* He would have been equally entitled to his discharge under the general rule, and the plaintiff would have been in the same situation if the defendant's statement, that his father had given his consent to waive that right, was true.] The plaintiff's attorney swore that he should have charged *T. B. Melton*, had it not been for the false representation of the defendant. That misrepresentation then, and not the incorrectness of the undertaking, occasioned the loss of the body. [*Lord Lyndhurst C. B.* The plaintiff's attorney says, in substance, that he should never have accepted any undertaking, correct or incorrect, had he not been satisfied by the defendant's representation that *T. B. Melton* had given him authority to consent. On the other hand it may be urged, that as the undertaking given was informal, the plaintiff's attorney was in the same situation as if *T. B. Melton* had given the defendant the requisite authority. The validity or the

reverse of that document is not here in question; the damage was, the loss of the body. That was occasioned by the defendant's deceit, and would have equally happened had the undertaking been correct in form, for *T. B. Melton* would still have taken the same advantage, relying on the absence of his authority to the defendant to consent to the postponement in question. [Lord *Lyndhurst* C. B. If the attorney's representation bound his principal, was it not immaterial to the plaintiff's attorney whether that representation was true or false? And if so, then the injury arose not from the falsehood of the representation, but from the informality of the document in not stating on the face of it, that the proceedings were staid at the request of *T. B. Melton* the defendant in the suit, according to the rule of this court. The misrepresentation appears to have been made as to a fact wholly immaterial; and if so, how can this action be maintained? The decision of *Hewitt v. T. B. Melton* (a), the father of this defendant, proceeded on the ground of the legal insufficiency of the undertaking.] That insufficiency followed up by fraudulent misrepresentation.

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 MELTON.

*Follett and Miller*, in support of the rule, were stopped by the court.

LORD LYNTHURST C. B. (23d May.)—This being an action brought to recover damages laid to have been occasioned by the act of the defendant, it is necessary that the plaintiff should maintain it by showing that they arose from the cause stated in the declaration, viz. the false representation of the defendant. Now as the defendant was attorney to his father in the former action, his act in giving the consent in question would have equally

(a) *Ante*, Vol. III. p. 503.

## THE MASTER AND TRINITY TERMS

AND THE COURT. I think or not he had his father's express authority. I think the next step is. The damage to the plaintiff has arisen not from the want of T.B. Merton's authority as a lawyer, but from the intention of the defendant. That document was treated as the discharge in the office and in the presence of the plaintiff's lawyer. This was as much a part of the discharge as it is the defendant.

JUDGMENT.—I am of the same opinion. It has been intended, as the damage, viz. the loss of the plaintiff's money, arose from the intention of the defendant, that his father had intended the contract of discharge. But something more was necessary to be done, for a document should have been properly treated according to the rule of law. This was not done: then the intention of the defendant was the ground of the discharge, and the question whether or not the authority had been in fact given is immaterial.

ALORDS 3.—The gist of this action is, that owing to a false representation of the defendant, damage was sustained by the plaintiff. Now that damage, which consisted in the discharge of T. B. Merton, did not arise from the false representation and is the declaration, but on the ground of a defect in the document itself.

GURNEY B.—I concur in opinion, though with regret, as the case appears to be one in which fraud has been practised.

Rule absolute for a nonsuit.

1834.

DIXON *against* NUTTALL.

**A**SSUMPSIT by payee against the maker of the following instrument, declared on as a promissory note.

“ I promise to pay to *M. A. D.* or bearer on demand, 16*l.* at sight, by given up clothes and papers &c.

*N. Nuttall.*”

It was averred that the defendant had sight. At the trial at the sittings in *Hilary* term no presentment of the note was proved, nor did it appear that the defendant ever saw it after it was made. For the defendant, it was objected that the instrument was not a promissory note; but *Bolland B.* held that the words “ by given up clothes and papers” meant for value received; and the court afterwards assented to his opinion by refusing a rule for a new trial on that point. The plaintiff had a verdict on the note, subject to leave to move for a nonsuit on the ground of defect of evidence. A rule having been obtained accordingly,

Where a promissory note was made payable to *D.* or bearer on demand at sight, it was held that the latter words could not be rejected, and that no action could be maintained without proving presentment for sight.

*Milner* showed cause. This instrument is in truth not a promissory note payable at sight, but on demand only, and the words “ at sight” should be struck out as inconsistent with its general tenor. The question therefore whether three days’ grace was allowable on such an instrument being expressed to be payable at sight (*a*), does not arise; but if it was, the days began to run from the making, and more than that time has elapsed between the making the note and the bringing

(*a*) See Chitty on Bills, 5th ed. 344; Bayley on Bills, 4th ed. 198, n. (52).



after date, which cannot be contended. The words "on demand" might as well be rejected as "at sight." The court here stopped him.

1834.

DIXON

v.

NUTTALL.

PARKE B.—I take it to be a rule applicable to all instruments, that we ought not to reject words in any case where we can give them a meaning. Now the meaning of this note is clear thus far, viz. that before the maker is to be called on to pay it, it must be presented for him to see it. That construction is not inconsistent with the other part of the note. The words "on demand" may have the effect of estopping the party from the benefit of the days of grace, but it is unnecessary to determine whether they had that effect or not; for we cannot reject the words "at sight." Nor are those words synonymous with "after date," for *Holmes v. Kerrison* decides, that a bill payable at a certain number of days after sight, is not payable till after presentment to the drawee. The meaning of this note clearly is, that the maker was not to be called on to pay till after sight. The rule therefore must be discharged.

BOLLAND B.—*Holmes v. Kerrison* ought to rule this case.

ALDERSON B.—It was argued that the sight of the maker at the time of his signing, was equivalent to the sight of the acceptor at the time of accepting, and therefore sufficient. That position was rested on the rule that a maker of a note is in the same situation as the acceptor of a bill, but that is a fallacy as applied to this question. *Holmes v. Kerrison* removed the only doubt I entertained.

GURNEY B. concurred.

Rule absolute.

1834.

KNOWLES, Assignee of WILSON and HARMER, Sheriffs  
of LONDON, against STEVENS.

In debt on a bail-bond, it is not a sufficient defence to plead that no affidavit of debt was filed in the action against the principal, pursuant to 12 G. 1. c. 29. s. 2.

*Seemle*, that to raise the question on that act, whether the entire absence of such an affidavit is a defence to an action on a bail-bond, it should be pleaded that no such affidavit was made. The plea must conclude with a verification or to the country.

**DEBT.** The declaration was on a bail-bond in the usual form (a). Plea, that before the suing out of the writ of *capias*, viz. against the principal in the declaration mentioned, there was no affidavit of the plaintiff's cause of action filed in this court, as required by the statutes in such case made and provided (b). Special demurrer, stating for causes that the matters pleaded in the said plea as to the sufficiency of the affidavit of the plaintiff's cause of action, as required by the statutes in such case to be made and filed in this court, are matter of law for the decision of this court, and not for a jury, and should not be left to a jury; and that the said plea should have been framed so as to have referred the matters therein stated to the court; and also for that the said plea consists altogether of matter of law; and also for that the matter pleaded in the said plea by way of defence cannot be so pleaded; and also that the plea hath no conclusion whatever either to the country or with a verification, and has no proper conclusion. Joinder in demurrer.

*Erle* in support of the demurrer. There is no conclusion to the plea. (Stopped by the court.)

Variance between writ and declaration.

(a) The writ of *capias* was marked and indorsed for bail for 37*l.* at suit of *Francis Knowles* against two defendants. The declaration was by *F. Knowles*, (stating him to be assignee of *Wilson* and *Harmer*) and against one defendant only. The court refused to set aside the declaration on motion; for though it gave the plaintiff a designation which did not appear in the writ, it set up no incongruity between them; and as only a single defendant was sued, it only narrowed the effect of the process.

(b) See 2 Chitty on Pl. 4th ed. 447, n. b., and form of plea, vol. 3. 979.

*Mansel* in support of the plea. First, the plea contains matter which is in substance an answer to the action. For the holding a defendant to bail without an affidavit of debt of the cause of action first made and filed, is contrary to 12 Geo. 1. c. 29. ss. 1 and 2 (a), though such affidavit need not be alleged in a declaration on a bail-bond (b). It is analogous to that pleaded by bail to an action on their recognizance that no *ca. sa.* was duly issued and prosecuted against the principal (c).

Then as to the form of the plea, the matter put in issue is of fact whether there was *any* affidavit. As the declaration does not set it out or refer to it as a substantive proposition, it was sufficient to deny it generally in the plea. Then the plea being merely negative required no verification, *Millner v. Crowdall* (d); and the plaintiff should have replied that there was such an affidavit, setting it out in the replication with a prout patet per recordum and verification; *Lowe v. Eldred* (e). *Hume v. Liversidge* (f) is no authority against this plea, for the plea there was, that no *proper* affidavit of the alleged cause of action was made and filed of record in the said court before the issuing the writ. That was held bad on demurrer, as not tendering a direct issue; but *Bayley B.* said, that the insufficiency of the affidavit might be objected to by setting it out with an allegation that there was no other. A prayer of judgment in a plea to the whole declaration is now irregular by *Reg. Gen. Hil. 4 W. 4. No. 9.*

1834.

KNOWLES  
v.  
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(a) He also cited 4 Ann. c. 16. s. 20., 7 & 8 Geo. 4. c. 71. s. 1., and 23 H. 6. c. 9.

(b) *Nightingale v. Wilcoxon*, 10 B. & Cr. 202; 1 Saund. 296, *notis.*

(c) 3 Ch. on Pl. 4th ed. 995.

(d) 1 Show. R. 338.

(e) *Ante*, Vol. III. 234.

(f) *Ante*, Vol. III. 257.

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KNOWLES  
v.  
STEVENS.

Lord LYNDHURST C. B. (*May 28th.*)—I am clearly of opinion that this plea is bad, and no answer to the action. It was not sufficient to aver that there was no affidavit of debt *filed*; for then, supposing such an affidavit to have been regularly sworn, a mere accidental neglect of the officer to file it might vitiate all the subsequent proceedings. That could never be intended: on the other point it is clear that there ought to have been a conclusion to the plea; but we are not called on to give any opinion as to what does not appear on this record.

ALDERSON B.—The statute 12 *Geo. 1. c. 29. s. 2.* enacts, that if after 24th *June 1726*, any writ or process shall issue for the sum of 10*l.* or upwards, and no affidavit shall be *made* as aforesaid, (omitting *and filed*, which appears in the previous part of the section,) the plaintiff shall not proceed to arrest the body, but shall proceed as in cases of causes of action not bailable. Then the defendant should have averred that no affidavit was *made* in order to raise the question on this act. The plea is also bad for want of a conclusion.

BOLLAND and GURNEY B*s.* concurring,

Judgment for plaintiff.

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1834.

STRUTT *against* SMITH.

**A**SSUMPSIT. Indebitatus count for goods sold. A sale of goods took place on terms of "7½ per cent. discount, bill at three months, 10 per cent. discount, cash in fourteen days." The sellers considering that they had been induced by fraud to sell the goods to defendant, held him to bail for the whole amount within the fourteen days, and declared in indebitatus assumpsit for goods sold. The jury found that the defendant meant not to avail himself of the 10 per cent. discount, but to take the longer credit. The plaintiffs had a verdict for the whole price of the goods sold; *Gurney B.* reserving leave to the defendant to move to enter a nonsuit, on the ground that the action was prematurely brought, and to reduce the verdict by the amount of discount, if the court should think the action maintainable at all. A rule having been accordingly obtained,

*Busby* showed cause. The verdict cannot be reduced after the finding of the jury, that the defendant did not intend to avail himself of the discount. The material point is, whether the action has been brought too soon? Now the whole transaction in obtaining

fraud.

1834.

STROUT  
v.  
SMITH.

the goods shortly before calling his creditors together was fraudulent as regarded the plaintiffs, and entitled them to rescind the contract; but they might also say, that the plaintiff had waived his right to credit, as the purchase by him was not *bonâ fide* at the time. In *Hogan v. Shee* (a), Lord *Kenyon* said, that in the case of goods sold on credit, if it appeared that there had been any fraud on the part of the buyer, though the time of credit was not expired, he was of opinion the party might consider the credit as void, and proceed immediately for the recovery of the money. So in *De Symons v. Minchwich* (b), *Eyre C. J.* said, that if an action be brought for goods sold within the time limited for credit, it cannot legally be supported, unless it was not a *bonâ fide* purchase at the time by the vendee, for if he meant to impose on or defraud the vendor of his goods, the defence will not avail. Both the above cases were actions of *indebitatus assumpsit*. [Parke B. The plaintiffs' difficulty is, that if they meant to treat the case as one in which goods had been obtained from them by fraud, they should have brought *trover*. In *Ferguson v. Carrington* (c), it was held, that where goods are purchased on credit by a person who is found to have fraudulently intended at the time of the contract not to pay for them, the vendor cannot sue for goods sold before the credit expired, though he might have sued in *trover* immediately. That case applies, if the contract was to pay 10 per cent. short of the price stated, if cash was paid at fourteen days, and 7½ per cent. short of it if a bill at three months was given. The exact contract is not clearly apparent, for it does not appear what credit was to be given if cash was not paid at the end of

(a) ? *Esp. C. N. P.* 523.(b) ? *Esp. C. N. P.* 490.(c) 9 *B. & Cr.* 59.

fourteen days, and no bill was given. *Gurney B.* The contract seems to have been to take off 10 per cent. if cash were paid in fourteen days, and 7½ per cent. if paid by a bill at three months. The cases cited are dicta only.] Unless the court can see that there was a distinct contract for a precise and specified credit, the plaintiffs might sue immediately for the whole price.

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v.  
SMITH.

*Bompas Serjt.* and *Kelly* supported the rule. This action was brought too soon, for this can in no sense be termed a ready-money transaction. It need not be contended, that if the defendant did not pay cash in fourteen days or give a bill, even if he had no option as to the further credit, he had at all events fourteen days; so that the plaintiffs could not sue before that period had expired. To a question from *Parke B.* they said that the contract for credit which existed when the goods were sold, might be thus stated in pleading:—that in consideration of the sale and delivery of the goods, the defendant undertook either to pay in cash in fourteen days, deducting 10 per cent. discount, or by a bill at three months, deducting discount at 7½ per cent.; or if he did not pay in either of those modes, then to pay the whole immediately on failure to give the bill, or according to the course and usage of the trade, which would probably determine the credit. But whatever might have been the credit stipulated for, if the bill was not given, the defendant was clearly entitled to fourteen days to elect whether he would give cash or take the credit or not, and the plaintiff could not sue in form *ex contractu* till after that period had elapsed.

*PARKE B. (26 May).*—The evidence of defendant's fraud gave the plaintiffs no right to rescind the ex-

1834.



STRUTT

v.

SMITH.

press contract of sale on credit, and to substitute for it another implied contract of sale for money to be paid on request. It might possibly have entitled them to maintain trover, on the ground that fraud had avoided the contract altogether; but in this form of action they adopt the contract as such in all its terms, and cannot be heard to say that it did not exist. *Ferguson v. Carrington* is a right decision on that subject. The question then is, what was the contract? That is involved in some obscurity. The jury, however, have found that the defendant did not intend to avail himself of the 10 per cent. discount, but of the option to take the further credit. It is clear that during the fourteen days he was not bound to pay on request, but had that interval in which to elect whether he would pay cash at the end of it, or would pay by a bill at three months, and the finding of the jury ascertains that he elected the latter. Then if he was not bound to pay for the goods at any price till after the fourteen days had elapsed, this declaration, which charges that the defendant was indebted to the plaintiff in a sum of money payable on request, is not supported by the evidence given at the trial.

BOLLAND B. was at chambers.

ALDERSON B.—I am of the same opinion. The printed paper seems to have been an offer by the plaintiffs of terms on which they were disposed to deal with the defendant, viz. either for cash at end of fourteen days, or on the terms of his giving them a bill at three months. Applying the facts of this case to those terms, one of the alternatives is disposed of; for no bill was given, and we are not required to determine what would be the credit, if the cash was not paid or the bill given; for as the jury have found in effect

that it was in the defendant's option to take the further credit, that difficulty is disposed of. It is clear then, that as the plaintiffs have sued within the fourteen days, during which the defendant had a right to consider in what way he should exercise his option to pay in cash or to take the further credit, the action is premature, and the rule for a nonsuit must be made absolute.

GURNEY B. concurred.

Rule absolute accordingly.

See *Earl of Bristol v. Wilmore*, 1 B. & Cr. 514; *Thompson v. Bond*, 1 Camp. 4; *Read v. Hutchinson*, 3 Camp. 351.

1834.

STRUTT  
v.  
SMITH.

MUDRY *against* NEWMAN and Another.

A Rule was obtained for judgment as in case of a nonsuit for not proceeding to trial. It had been enlarged for a term, in order to find the plaintiff's attorney; he not having been found after diligent search by the plaintiff and defendants, the rule was served on the plaintiff. In 1822, *Pinero*, an attorney, applied to the plaintiff, a *Frenchman*, to lend his name to sue the defendants; the plaintiff consented to be a witness, but never authorized the use of his name as plaintiff. *Pinero*, however, brought the action in his name, and issue was joined in it. The plaintiff was wholly ignorant that the action had been brought till the service of this rule.

On motion for judgment as in case of a nonsuit, it appeared that the action had been brought and carried on to issue without the plaintiff's knowledge or authority, by an attorney who could not be found after diligent search. The court ordered the rule to be served on the plaintiff himself:—

*Beldam* showed cause. The plaintiff should not be burdened with the payment of costs, for, as in common cases, a party will not be prejudiced by the use of his

Held, on showing cause, that the above circumstances did not exonerate

the plaintiff from liability to pay the costs, he having a remedy against the attorney; but the court enlarged the rule in order to find the attorney, and granted a rule calling on him to pay the defendant his costs.

*Addenda of References to other Cases, Corrigenda, &c.*

[It is much desired that useful notices of this nature should be communicated to the Editor for his better guidance and future revision of his reports.]

- Page 29, add to *Doe v. Hare*, "See *Doe v. Davis*, 1 Esp. C. N. P. 338. Lord Kenyon S. P. Secus, if judgment signed against the casual ejector, *id.* See 4 Taunt. 7. 1 Stark. C. N. P. 306. 1 Bos. & P. 205."
- 31, add to *Guy v. Newson*, "See 4 Bing. 209."
- 44, add to *Fisher v. Papanicolas*, "See *Hutson v. Hutson*, 7 T. R. Bligh and another v. *Brewer*, Exch. M. 1834."
- 64, add to *Watson v. Abbott*, "See *Hemming v. Samuel*, 3 M. & S. 818. *Johnson v. Wells*, 2 D. P. C. 352. *Hill v. Salter*, *id.* 380."
- 68, add to *Price v. Huxley*, "See 1 Bing. New Cases, 5, 7."
- 87, add to *Walter v. Cubby*, "See *Jacobs v. Josephs*, 2 Stark. C. N. P. 45, and *Sparkes v. Spur*, Chitty's Stamp Laws, 26. *Stevens v. Lloyd*, M. & M. 293."
- 93, add after Rule discharged with costs, "It being part of the rule that indemnity should be given to the assignees."
- 111, add to *Reid v. Lord Tenterden*, "See *Remnant v. Bremridge*, 8 Taunt. 191. *Nation v. Toser*, *post*, 561. *Tremeser v. Morrison*, 1 Bing. N. C. 89., reported since the principal case was published."
- 123, add after defendant in line 5., "Follett also urged that no action would lie for money had and received &c., for want of privity between the plaintiff and the Bank of England, citing *Sims v. Brittain*, 4 B. & C. 375; but Bayley B. said, that in that case the money was paid to the defendants by a person having a right of control over it, and that the money paid in by the bankrupt in this case was money had and received to the use of the assignees."
- 133, add to *Owen v. Burnett*, "See *Harington v. Caswell*, 6 C. & P. 332."
- 144, add to *Doe v. Packer*, "See 4 D. & R. 716. 9 B. & Cr. 760. 2 B. & P. 23, n."
- 158, add "See *Parry v. Gibson*, 1 Adol. & Ell. R. 48."
- 165, line 18, after "clients (b)," add a ].
- 270, add to *Johnson v. Wills*, "See *Thomas v. Edwards*, *post*."
- 271, *Hill v. Salt*, line 3 from bottom, after "record" add "See s. 18."
- 276, add to *Braithwaite v. Montford*, "See *post*, 450."

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Page 286, add to note (a), "See post, 765."

— 308, line 3, of *Nicholson v. Lemon*, after *January* insert "without a continuance."

add to marginal note "In cases where the writ is not issued to prevent the operation of the statute of limitations, the alias or pluries may be sued out at any time, and the continuances, if necessary, entered as formerly, to connect the alias and pluries with the first writ."

— 477, line 2 from top, after "c. 16" add, "but that act does not enable the assignees to do more than the bankrupt might have done, and makes no difference as to the party who shall bring the action."

— 502, add to *Bright v. Walker*, "See *Monmouth Canal Company v. Harford*, post, Vol. V. p. 68."— 611, line 4 of note (a), after "2 Camp. 103" add, "See *Sparrow v. Hawkes*, 2 Esp. 504."— 626, *Jess v. Roy*. "A verdict was found for plaintiff at the summer Surrey assizes cor. Bayley B., subject to a special case stating in effect the facts in the text."— 649, *Doe v. Roe*, add "See now *Doe d. Ashman v. Roe*, 1 Bing. N. C. 253, M. 1834, contra."

— 661, line 14, after "bankruptcy," add a ].

— 670, note to *Bate v. Kinsey*, add "See 1 Adol. & Ell. B. 31, and 3 Stark. C. N. P. 140, *Harris v. Hill*."— 695, *Emery v. Day*, add "See *Fletcher v. Grocsmell*, H. 1835, 5 Tyr."— 736, note (a) add "And see *Reed v. Dickens*, 5 B. & Ad. 499."

— 768, line 2 from top, for "their laws" read "this law."

— 701, add to *Hutchinson's* argument "See 1 Chitty on Pl. 4th ed. 337. 4 Dowl. & Ry. 215, *Parker v. Bailey*."

— 852, marginal note, line 8 from bottom, for "a disclaimer" read "an admission of an antecedent disclaimer."

— 892, line 20, before "9 and 10 &amp;c." insert "5 W. &amp; M. c. 21. s. 11. repeated in"

*For the convenience of the Profession, the Rules promulgated in Hilary Term, 1834, and which took effect on the first day of Easter Term, 1834, are prefixed to the present Number, but are intended to be placed at the end of the Volume.*

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## REGULÆ GENERALES (a).

*Hilary Term, 1834.*

1834.

REGULÆ  
GENERALES.

IT IS ORDERED, That from and after the first day of Easter Term next inclusive, the following Rules shall be in force in the Courts of King's Bench, Common Pleas, and Exchequer of Pleas and Courts of Error, in the Exchequer Chamber.

1. No demurrer, nor any pleading subsequent to the declaration, shall in any case be filed with any officer of the Court, but the same shall always be delivered between the parties.

Demurrers to be  
delivered, not filed.

2. In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated: and if any demurrer shall be delivered, without such statement, or with a frivolous statement, it may be set aside as irregular, by the Court or a Judge, and leave may be given to sign judgment as for want of a plea.

Demurrers delivered without  
statement in margin of the point to  
be argued, or with  
frivolous statement—consequences.

Provided, that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the Court in the usual way.

Provido that the  
party demurring  
may on argument  
insist on further  
matters of which  
Court has had  
usual notice.

3. No rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound, within four days after such demand, to deliver the same, otherwise judgment.

Joinder in demurrer to be demanded and delivered in four days, or judgment.

4. To a joinder in demurrer no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof.

No signature to  
such joinder.

5. The issue or demurrer book shall on all occasions be made up by the suitor, his attorney or agent, as the case may be, and not as heretofore by any officer of the Court.

Issues and demurrer books not to be made up by officer of court.

(a) The marginal notes, &c. are added by the Reporter for more convenient reference.

1834.

**REGULÆ  
GENERALES.**

No motion for  
concilium.  
Demurrers, spe-  
cial cases and ver-  
dicts, how set  
down for argu-  
ment.

Delivering copies  
of demurrer books,  
&c. to Judges.

Consequences of  
default.

Requisites of  
plea of judgment  
recovered in  
another court, and  
consequences of  
neglect to comply  
with them, or of  
false statement.

Writ of error  
no supersedeas of  
execution till  
notice of allow-  
ance served,  
stating particular  
error to be argued.

Consequence if  
error stated be  
frivolous.

6. No motion or rule for a concilium shall be required; but demurrers, as well as all special cases and special verdicts, shall be set down for argument at the request of either party, with the Clerk of the Rules in the King's Bench and Exchequer, and a Secondary in the Common Pleas, upon payment of a fee of one shilling, and notice thereof shall be given forthwith by such party to the opposite party.

7. Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior Judge of the Court in which the action is brought; and the defendant shall deliver copies to the other two Judges of the Court next in seniority; and in default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default: and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Clerk of the Rules in the King's Bench and Exchequer, or the Secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies.

8. Where a defendant shall plead a plea of judgment recovered in another Court, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a Court of Record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the Court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the Court or a Judge.

9. No writ of error shall be a supersedeas of execution until service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued.

Provided, that if the error stated in such notice shall appear to be frivolous, the Court, or a Judge, upon summons, may order execution to issue.

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REGULÆ  
GENERALES.

10. No rule to certify or transcribe the record shall be necessary; but the plaintiff in error shall, within twenty days after the allowance of the writ of error, get the transcript prepared and examined with the Clerk of the Errors of the Court in which the judgment is given, and pay the transcript money to him; in default whereof the defendant in error, his executors or administrators, shall be at liberty to sign judgment of non pros. The Clerk of the Errors shall, after payment of the transcript money, deliver the writ of error when returnable, with the transcript annexed, to the Clerk of the Errors of the Court of Error.

Transcript to be prepared and examined with the clerk of the errors in 20 days after allowance, without rule to certify or transcribe.

Writ of error and transcript, how delivered.

11. No rule to allege diminution, nor rule to assign errors, nor scire facias quare executionem non, shall be necessary, in order to compel an assignment of errors; but within eight days after the writ of error, with the transcript annexed, shall have been delivered to the Clerk of the Errors of the Court of Error, or to the signer of the writs in the King's Bench in cases of error to that Court, or within twenty days after the allowance of the writ of error in cases of error coram nobis, or coram vobis, the plaintiff in error shall assign errors, and in failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of non pros.

In eight days after such delivery, or in twenty days after allowance in error coram nobis or vobis, plaintiff in error shall assign errors, and if he does not, judgment of non pros may be signed.

Rules to allege diminution, assign errors, and sci. fa. quare executionem non, abolished.

12. The assignment of errors and subsequent pleadings thereon shall be delivered to the attorney of the opposite party, and not filed with any officer of the Court.

Assignment of errors, &c. to be delivered to opposite attorney.

13. No scire facias ad audiendum errores shall be necessary (unless in case of a change of parties), but the plaintiff in error may demand a joinder in error, or plead to the assignment of errors; and the defendant in error, his executors or administrators, shall be bound, within twenty days after such demand, to deliver a joinder or plea, or to demur, otherwise the judgment shall be reversed.

Sci. fa. ad aud. errores abolished.

Defendant in error must join in error, plead to the assignment, or demur, within 20 days after demand of joinder, &c. or judgment reversed.

Provided, that if in any case the time allowed as hereinbefore mentioned, for getting the transcript prepared and examined, for assigning errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the tenth day of August in any year, the party entitled to such time shall have the like time for the same purpose, after the twenty-fourth day of October, without reckoning any of the days before the tenth of August.

Provido if the above times have not expired before 10th August.

Provided also, that in all cases such time may be extended by a Judge's order.

Extending time by Judge's order.

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Sci. fa. to terre-  
tenants in error to  
reverse fines, &c.  
Setting down and  
arguing issue in  
law in Court of  
Error.

Provided also, that in all cases of writs of error to reverse fines and common recoveries, a scire facias to the terretenants shall issue as heretofore.

14. When issue in law is joined, either party may set down the case for argument with the Clerk of the Errors of the Court of Errors, or the Clerk of the Rules in the King's Bench, as the case may require, and forthwith give notice in writing thereof to the other party, and proceed to argument in like manner as on a demurrer, without any rule or motion for a concilium.

Delivering copies  
of judgment  
below, of the as-  
signment of errors,  
and of the plead-  
ings thereon, to  
Judges.

15. Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment of the Court below, and of the assignment of errors, and of the pleadings thereon, to the Judges of the King's Bench, on writs of error from the Common Pleas or Exchequer, and to the Judges of the Common Pleas on writs of error from the King's Bench; and the defendant in error shall deliver copies thereof to the other Judges of the Court of Exchequer Chamber, before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Clerk of the Errors, or the Clerk of the Rules in the King's Bench, as the case may be, a sufficient sum to pay for such copies.

Consequences of  
default.

Proceedings in  
error need not be  
entered of record  
till after judgment  
in the Court of  
Error.

16. No entry on record of the proceedings in error shall be necessary before setting down the case for argument, but after judgment shall have been given in the Court of Errors in the Exchequer Chamber, either party shall be at liberty to enter the proceedings in error on the judgment roll remaining in the Court below, on a certificate of a Clerk of the Errors of the Exchequer Chamber of the judgment given, for which a fee of 3s. 4d. and no more, shall be charged.

Notice of taxation  
not necessary  
where no appear-  
ance.

17. Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian, notwithstanding the general rule of Trinity Term, 1st Will. IV. s. 12.

Repassing nisi  
prius records  
abolished.

Amending teste  
and return of dis-  
tringas, habeas  
corpora, or clause  
of nisi prius.

18. It shall not be necessary to repass any Nisi Prius record which shall have been once passed, and upon which the fees of passing shall have been paid; and if it shall be necessary to amend the day of the teste and return of the distringas or habeas

corpora, or of the clause of Nisi Prius, the same may be done by the order of a Judge obtained on an application ex parte.

19. Writs of trial shall be sealed only, and not signed.

20. Either party, after plea pleaded and a reasonable time before trial, may give notice to the other, either in town or country, in the form hereto annexed, marked A, or to the like effect, of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent by indorsement upon such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to shew cause before a Judge, why he should not consent to such admission; or in case of refusal, be subject to pay the costs of proof. And unless the party required shall expressly consent to make such admission, the Judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the Judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause.

Provided that if the Judge shall think the application unreasonable, he shall indorse the summons accordingly.

Provided also, that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the Judge shall order the same to be made.

No costs of proving any written or printed document shall be allowed to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the Judge shall have indorsed upon the summons that he does not think it reasonable to require it.

A Judge may make such order as he may think fit respecting the costs of the application and the costs of the production and inspection; and in the absence of a special order, the same shall be costs in the cause.

(Signed by the fifteen Judges.)

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Writs of trial.

Notice to opposite party of intention to adduce in evidence written or printed documents, and calling on him to admit them.

Summons, if admission not consented to.

Judge may order costs of proving document to be paid by party required to admit it, whatever may be the result of the cause.

Application unreasonable.

Time for inquiry, inspection, &c.

Imposing terms.

Consent to admission.

Costs of proving documents not allowed, unless this notice has been given, and adverse party has refused or neglected to make it, or Judge has indorsed that it was not reasonable to require it.

Judge may make order as to costs of application, &c. If he does not, they are costs in the cause.

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## PLEADING.

**WHEREAS** it is provided by the statute 3 & 4 *Will. 4. c. 42.* Recital of 3 & 4 Will. 4. c. 42. s. 1. giving the judges power to alter by rule or order made within 5 years.

**s. 1,** That the Judges of the Superior Courts of Common Law at Westminster, or any eight or more of them, of whom the chiefs of each of the said Courts should be three, should and might by any Rule or Order to be from time to time by them made, in term or vacation, at any time within five years from the time when the said act should take effect, make such alterations in the mode of pleading in the said Courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise, for carrying into effect the said alterations, as to them might seem expedient; which Rules, Orders, and Regulations, were to be laid before both Houses of Parliament, as therein mentioned, and were not to have effect until six weeks after the same should have been so laid before both Houses of Parliament, but, after that time, should be binding and obligatory on the said Courts, and all other Courts of Common Law, and be of the like force and effect, as if the provisions contained therein had been expressly enacted by parliament.

Mode of pleading,  
&c.Such rules not to  
have effect till six  
weeks after laid  
before both  
houses.

**Provided** that no such Rule or Order should have the effect of depriving any person of the power of pleading the general issue, and of giving the special matter in evidence in any case wherein he then was, or thereafter should be entitled so to do by virtue of any act of parliament then or thereafter to be in force.

Proviso that no  
such rule should  
deprive party of  
power to plead  
general issue, and  
give special matter  
in evidence when  
now or hereafter  
entitled by statute  
so to do.

**IT IS THEREFORE ORDERED,** That from and after the first day of Easter Term next inclusive, unless parliament shall in the meantime otherwise enact, the following Rules and Regulations, made pursuant to the said statute, shall be in force:—

## FIRST—GENERAL RULES AND REGULATIONS.

1. Every pleading, as well as the declaration, shall be entitled of the day of the month and year when the same was pleaded, and shall bear no other time or date; and every declaration, and other pleading, shall also be entered on the record made up for

All pleadings to be  
entitled by day of  
month and year,  
and to be entered  
on nisi prius  
record and judg-  
ment roll, except  
ordered otherwise  
by judge.

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No entry of continuances to be on roll except the *jurata ponitur in respectu*.

Times of proceeding in cause not altered.

Plea *puis darrein* continuance, how pleaded.

Affidavit that the matter arose within 8 days before such plea pleaded.

All judgments to be entered of record of day, of month, and year, when signed, and to relate to no other day.

But Judge, &c. may order an entry *nunc pro tunc*.

No entry on record of warrants to sue, &c.

*Pleading Rules—Several Counts, Pleas, Avowries, &c. and Pleas in bar in replevin.*

Several counts not to be allowed unless distinct subject of complaint intended to be set up on each. Nor several pleas, avowries, or cognizances, unless distinct ground of answer intended in respect of each.

trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a Judge.

2. No entry of continuances by way of imparlance, *curia adversari vult, viccomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained. (See Form No. 3, p. xix.)

Provided that such regulation shall not alter or affect any existing rules of practice, as to the times of proceeding in the cause.

Provided also, that in all cases in which a plea *puis darrein continuance* is now by law pleadable, in Banc or at Nisi Prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be.

Provided also, that no such plea shall be allowed, unless accompanied by an affidavit, that the matter thereof arose within eight days next before the pleading of such plea, or unless the Court or a Judge shall otherwise order.

3. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day.

Provided that it shall be competent for the Court, or a Judge, to order a judgment to be entered *nunc pro tunc*.

4. No entry shall be made on record of any warrants of attorney to sue or defend.

5. (a) And whereas, by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties, more distinctly than heretofore; and by the said act of the 3 & 4 Will. 4, c. 42, s. 23, the powers of amendment at the trial, in cases of variance in particulars not material to the merits of the case, are greatly enlarged; several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each, nor shall several pleas, or avowries, or cognizances, be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.

(a) This 5th rule does not apply where the declaration bears date before the 1st day of Easter Term, 1834. See p. xviii, post.

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Therefore counts, founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed.

*Pleading Rules*  
—*Several Counts,*  
*Pleas, Avowries,*  
*&c. and Pleas in*  
*bar in replavin.*

*Ex. gr.* Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed, for they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.

Counts on one matter of complaint, but varied in statement, &c. only, not allowed.

Examples of declarations.

Contracts without condition, &c.

So counts for not giving, or delivering, or accepting a bill of exchange in payment, according to the contract for sale for goods sold and delivered, and for the price of the same goods to be paid in money, are not to be allowed.

Non-delivery of bill in payment for goods and for price of them to be paid in money.

So counts for not accepting and paying for goods sold, and for the price of the same goods as goods bargained and sold, are not to be allowed.

Not accepting and paying for goods and for price of same as bargained and sold.

But counts upon a bill of exchange or promissory note, and for the consideration of the bill or note in goods, money, or otherwise, are to be considered as founded on distinct subject-matters of complaint, for the debt and the security are different contracts; and such counts are to be allowed.

On bill or note, and for the consideration thereof, in goods, &c. &c. are to be allowed.

Two counts upon the same policy of insurance are not to be allowed.

Policy of insurance.

But a count upon a policy of insurance, and a count for money had and received, to recover back the premium, upon a contract implied by law, are to be allowed.

Premiums.

Two counts on the same charter-party are not to be allowed.

Charter-party.

But a count for freight upon a charter-party, and for freight *pro rata itineris*, upon a contract implied by law, are to be allowed.

Freight.

Counts upon a demise, and for use and occupation of the same land for the same time, are not to be allowed.

Demise, and use and occupation.

In actions of tort for misfeasance, several counts for the same injury, varying the description of it, are not to be allowed.

Tort for misfeasance.

In the like actions for nonfeasance, several counts, founded on varied statements of the same duty, are not to be allowed.

Tort for nonfeasance.

Several counts in trespass for acts committed at the same time and place are not to be allowed.

Trespass.

Where several debts are alleged in *indebitatus assumpsit* to be due in respect of several matters—*ex. gr.* for wages, work and labour as a hired servant, work and labour generally, goods sold and delivered, goods bargained and sold, money lent, money paid, money had and received, and the like, the statement of

Statement of each of several debts in *indebitatus assumpsit* is to be considered as "a several count," though only one promise to pay laid.

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*Pleading Rules—  
Several Counts,  
Pleas, Avowries,  
&c. and Pleas in  
bar in replevin.*  
Except account  
stated.

More breaches  
than one may be  
laid in the same  
count.

Several Pleas—  
Avowries—Cog-  
nizances, and  
Pleas in bar in re-  
plevin, varied in  
statement only,  
not allowed.

Instances; *solvit  
ad et post diem.*

Payment, accord,  
satisfaction, and  
release.

Agreements to ac-  
cept security of  
third parties for  
debt.

Agreement to for-  
bear for a time in  
consideration of  
such security.

*Lib. ten.*—ease-  
ments, rights of  
way and common,  
common of turbary  
and estovers.

Right of common.

Rights of way.

Avowries for dis-  
tresses for rents,  
and for dam. fees.

each debt is to be considered as amounting to a several count, within the meaning of the rule which forbids the use of several counts, though one promise to pay only is alleged in consideration of all the debts.

Provided that a count for money due on an account stated may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

The rule which forbids the use of several counts, is not to be considered as precluding the plaintiff from alleging more breaches than one of the same contract in the same count.

*Ex. gr.* Pleas, avowries, and cognizances, founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar in replevin are within the rule,) are not to be allowed.

Pleas of *solvit ad diem* and of *solvit post diem* are both pleas of payment, varied in the circumstance of time only, and are not to be allowed.

But pleas of payment and of accord and satisfaction, or of release, are distinct, and are to be allowed.

Pleas of an agreement to accept the security of *A. B.* in discharge of the plaintiff's demand, and of an agreement to accept the security of *C. D.* for the like purpose, are also distinct, and to be allowed.

But pleas of an agreement to accept the security of a third person in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct; for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

In trespass *quare clausum fregit*, pleas of soil and freehold of the defendant in the *locus in quo*, and of the defendant's right to an easement there, pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed.

But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

So pleas of a right of way over the *locus in quo*, varying the *termini* or the purposes, are not to be allowed.

Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

But avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.

The examples in this and other places specified, are given as some instances only of the application of the Rules to which they relate, but the principles contained in the Rules are not to be considered as restricted by the examples specified.

6. Where more than one count, plea, avowry, or cognizance shall have been used in apparent violation of the preceding Rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, pleas, avowries, or cognizances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognizances, introduced in violation of the Rule, be struck out at the cost of the party pleading, whereupon the Judge shall order accordingly, unless he shall be satisfied, upon cause shown, that some distinct subject-matter of complaint is *bond fide* intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognizances, in which case he shall indorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application which shall be allowed.<sup>(a)</sup>

7. Upon the trial where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence as well as those of the pleadings; and further, in all cases in which an application to a Judge has been made under the preceding Rule, and any count, plea, avowry, or cognizance allowed as aforesaid, upon the ground that some distinct subject-matter of complaint was *bond fide* intended to be established at the trial in respect of each count so allowed, or some distinct ground of

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*Pleading Rules—Several Counts, Pleas, Avowries, &c. and Pleas in bar in reply.*

Distress for rent. These examples only instances of application of rules.

Where more than one count, plea, &c. used, opposite party may apply to judge for order to strike out such pleas, counts, &c.

Judge shall order accordingly, or may indorse that there is distinct subject-matter of complaint, answer, or defence intended to be established in respect of each count, plea, &c. specifying which count, &c. shall be allowed.

Where on trial there is more than one count, plea, &c. and no distinct complaint or defence made out in respect of each. Verdict and judgment shall pass against plaintiff or defendant on each count, &c. on which such complaint or defence is not made out, with costs occasioned thereby, as well of evidence as pleadings, to be paid to the other party.

Party how deprived of costs, &c.

(a) This 6th rule does not apply to any case in which the declaration bears date before the 1st day of Easter term, 1834. See p. xviii. post.

13. All special traverses, or traverses with an inducement of affirmative matter, shall conclude to the country.

Provided that this regulation shall not preclude the opposite party from pleading over to the inducement, when the traverse is immaterial.

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Special traverses.  
Pleading over to  
inducement in tra-  
verse.  
Demurrer.

14. The form of a demurrer shall be as follows :

The said defendant, by his attorney [or, "in person," &c. or, "plaintiff"] says that the declaration, [or, "plea," &c.] is not sufficient in law ;—showing the special causes of demurrer, if any.

The form of a joinder in demurrer shall be as follows :

The said plaintiff, [or, "defendant"] says that the declaration [or, "plea," &c.] is sufficient in law.

Joinder.

15. The entry of proceedings on the record for trial, or on the judgment roll, (according to the nature of the case,) shall be taken to be, and shall be in fact, the first entry of the proceedings in the cause, or of any part thereof, upon record, and no fees shall be payable in respect of any prior entry made, or supposed to be made, on any roll or record whatever.

Entry of proceed-  
ings on record for  
trial or on judg-  
ment roll.

16. No fees shall be charged in respect of more than one issue by any of the officers of the Court, or of any Judge at the assizes, or any other officer, in any action of assumpsit, or in any action of debt on simple contract, or in any action on the case.

Officers fees on  
issues.

17. When money is paid into Court, such payment shall be pleaded in all cases, and as near as may be in the following form, *mutatis mutandis* :

Payment of money  
into Court to be  
pleaded.

C. D. } The day of  
ats. } The defendant by his attorney  
A. B. } [or, "in person," &c.] says, that the plaintiff ought not further  
to maintain his action, because the defendant now brings into  
Court the sum of £ ready to be paid to the plaintiff. And  
the defendant further says, that the plaintiff has not sustained damages  
[or, in actions of debt, "that he is not indebted to the plaintiff,"] to a  
greater amount than the said sum &c. in respect of the cause of action in  
the declaration mentioned, and this he is ready to verify ; wherefore he  
prays judgment if the plaintiff ought further to maintain his action.

18. No Rule or Judge's order to pay money into Court shall be necessary, except under the 3 & 4 Will. 4, c. 42, s. 21, but the money shall be paid to the proper officer of each Court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand.

How to be done  
Rule to pay mo-  
ney into Court  
not necessary.

19. The plaintiff, after the delivery of a plea of payment of money into Court, shall be at liberty to reply to the same, by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action in respect of which it has been paid

Replication to  
plea of payment  
into Court.

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Taking costs and  
signing judgment  
for them.

in, and he shall be at liberty in that case to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed, or the plaintiff may reply "that he has sustained damages, [or, 'that the defendant is indebted to him,' *as the case may be*,] to a greater amount than the said sum," and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit.

Plea, abatement  
in of non-join-  
der.

20. In all cases under the 3 & 4 *Will. 4*, c. 42, s. 10, in which, after a plea in abatement of the non-joinder of another person, the plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, the commencement of the declaration shall be in the following form:

Form.

(*Venue*)—*A. B.*, by *E. F.* his attorney, [or, "in his own proper person," &c.] complains of *C. D.* and *G. H.* who have been summoned to answer the said *A. B.*, and which *C. D.* has heretofore pleaded in abatement the non-joinder of the said *G. H.* &c. (The same form to be used *mutatis mutandis* in cases of arrest or detainer.)

Actions by and  
against assignees,  
executors, or nominal parties.

21. In all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied.

## PLEADINGS IN PARTICULAR ACTIONS.

[*N. B.* Nothing in the following rules applies to any case in which the declaration bears date before the 1st day of Easter Term, 1834. See p. xviii. *post*.]

### 1. ASSUMPSIT.


*Non assumpsit*,  
effect of.

1. In all actions of assumpsit, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.

In warranties.

*Es. gr.* In an action on a warranty, the plea will operate as

a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

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 In policies.

In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In actions against carriers and other bailees.

In an action of *indebitatus assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

In actions for goods sold and delivered, and money had and received.

2. In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *e. g.* the drawing or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

In actions on bills and notes.

3. In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded. *Ex. gr.* infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

Pleas in assumpsit and in confession and avoidance to be specially pleaded.

Enumerated.

4. In actions on policies of assurance, the interest of the assured may be averred thus:—"That *A.*, *B.*, *C.* and *D.*, or some or one of them, were or was interested, &c.;" and it may also be averred, "that the insurance was made for the use and benefit, and on the account of the person or persons so interested."

Policies of assurance.

## II. IN COVENANT AND DEBT.

1. In debt on specialty, or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of

Effect of non est factum.

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*Nil debet* abolished.

Pleas in debt on simple contract.

fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

2. The plea of *nil debet* shall not be allowed in any action.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "he never was indebted in manner and form as in the declaration alleged," and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*, and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit.

How to plead in other actions of debt where *nil debet* hitherto allowed.

4. In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

### III. DETINUE.

Effect of non detinet.

The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea.

### IV. IN CASE.

Effect of not guilty.

1. In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration.

In nuisance.

*Ex. gr.* In an action on the case for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house; and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way. And in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods. In an action of

In obstructing rights of way.

In slander,

slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff, or his officers, but not of the debt, judgment, or preliminary proceedings. In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

1834.

REGULE  
GENERALES.

In escape.

Against carriers.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit.

Confession and  
avoidance.

## V. IN TRESPASS.

1. In actions of trespass *quare clausum fregit*, the close or place in which &c. must be designated in the declaration by name or abuttals, or other description, in failure whereof the defendant may demur specially.

Abuttals—locus in  
quo.

2. In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

Not guilty in tres-  
pass quare clau-  
sum fregit.

3. In actions of trespass *de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged, by taking or damaging the goods mentioned, but not of the plaintiff's property therein.

Not guilty in tres-  
pass de bonis as-  
portatis.

4. Where in an action of trespass *quare clausum fregit*, the defendant pleads right of way with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved, as shall be justified by the right of way so found, and for the plaintiff, in respect of such of the trespasses as shall not be so justified.

Pleading right of  
way.

5. And where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kinds

Pleading rights of  
common.

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GENERALES.

Allegations as to  
extent of rights of  
way or common  
to be taken distrib-  
utively.

of cattle, *ex. gr.* horses, sheep, oxen and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified.

6. And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

Provided nevertheless, that nothing contained in the 5th, 6th, or 7th, of the above-mentioned General Rules and Regulations, or in any of the above-mentioned Rules or Regulations relating to pleading in particular actions, shall apply to any case in which the declaration shall bear date before the first day of Easter Term next [1834].

ISSUES, JUDGMENTS, and other PROCEEDINGS, in Actions commenced by process under 2 Will. IV. c. 39. shall be in the several forms in the Schedule hereunto annexed, or to the like effect, *mutatis mutandis*. Provided, that in case of non-compliance, the Court or Judge may give leave to amend.

## No. 1.

*Form of an Issue in the King's Bench, Common Pleas, or Exchequer.*

In the King's Bench ; or,  
In the Common Pleas ; or,  
In the Exchequer.

The (a)                      day of                      , in  
the year of our Lord 18                      .

(*Venus.*) A. B., by E. F. his attorney [or, in his own proper person, or by E. F., who is admitted by the Court here to prosecute for the said A. B. who is an infant within the age of twenty-one years, as the next friend of the said A. B., as the case may be], complains of C. D., who has been summoned to answer the said A. B. [or, arrested or detained in custody], by virtue [or, served with a copy, as the case may be,] of a writ issued on (b) the day of                      , in the year of our Lord 18                      , out of the Court of our Lord the King before the King himself, at *Westminster*, [or, out of the Court of our Lord the King before his Justices at *Westminster*, or, out of the Court of our Lord the King before the Barons of his Exchequer at *Westminster*, as the case may be], *for that*

[Copy the declaration from these words to the end, and the plea and subsequent pleadings, to the joinder of issue.]

Thereupon the sheriff is commanded that he cause to come here, on the day of                      , twelve &c., by whom &c., and who neither &c., to recognize &c., because as well &c.

(a) Date of declaration.

(b) Date of first writ.

## No. 2.

1834.

*Form of Nisi Prius Record in the King's Bench, Common Pleas, or Exchequer.*

[*The placitas are to be omitted.—Copy the issue to the end of the award of the venire, and proceed as follows:*]

Afterwards on the (a) day of in the year  
the jury between the parties aforesaid is respited here until the (b)  
day of unless shall first come on the (c)  
day of at according to the form of  
the statute in such case made and provided for default of the jurors, because  
none of them did appear; therefore let the sheriff have the bodies of the  
said jurors accordingly.

[*The postea is to be in the usual form.*]

## No. 3.

*Form of Judgment for the Plaintiff in Assumpsit.*

[*Copy the issue to the end of the award of the venire, and proceed as follows:*]

Afterwards the jury between the parties is respited [see p. viii.] until the (d)  
day of unless shall first come on the (e)  
day of at according to the form of the statute in that case  
made and provided for default of the jurors, because none of them did appear.  
Afterwards on the (f) day of come the parties afore-  
said, by their respective attorneys aforesaid, [or as the case may be,] and  
before whom the said issue was tried, hath sent hither his record  
had before him in these words:

[*Copy postea.*]

Therefore it is considered that the said A. B. do recover against the said  
C. D. his said damages, costs, and charges by the jurors aforesaid in form  
aforesaid assessed; and also £ for his costs and charges by the Court  
here adjudged of increase to the said A. B. with his assent; which said damages,  
costs, and charges, in the whole, amount to £ , and the said C. D. in  
mercy &c.

## No. 4.

*Form of the Issue when it is directed to be tried by the Sheriff.*

[*After the joinder of issue proceed as follows:*]

And forasmuch as the sum sought to be recovered in this suit, and indorsed  
on the said writ of summons, does not exceed £20, hereupon on the (g)  
day of in the year pursuant to the  
statute in that case made and provided, the sheriff [or, the judge of  
being a court of record for the recovery of debt in the said county, as the case  
may be,] is commanded that he summon twelve &c., who neither &c., who  
shall be sworn truly to try the issue above joined between the parties aforesaid,  
and that he proceed to try such issue accordingly, and when the same shall  
have been tried, that he make known to the Court here what shall have been  
done by virtue of the writ of our Lord the King to him in that behalf directed,  
with the finding of the jury thereon indorsed on the day of  
, &c.

## No. 5.

*Form of Writ of Trial.*

William the Fourth, by, &c. To the sheriff of our county of  
[or, to the Judge of , being a court of record for  
the recovery of debt in our county of , as the case may be].

- (a) Teste of distringas, or habeas corpora.
- (b) Return day of distringas, or habeas corpora.
- (c) First day of sittings, or commission day of assizes.
- (d) Return of distringas, or habeas corpora.
- (e) Day of sittings, or nisi prius.
- (f) Day of signing final judgment.
- (g) Teste of writ of trial.

REGULÆ  
GENERALES.

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REGULÆ  
GENERALES.

Whereas A. B., in our Court before us at *Westminster*, [or, in our Court before our Justices at *Westminster*, or, in our Court before the Barons of our Exchequer at *Westminster*, as the case may be], on the (a) day of last, impleaded C. D. in an action on promises [or as the case may be].

For that whereas one &c. [here recite the declaration as in a writ of inquiry], and thereupon he brought suit.

And whereas the defendant, on the day of last, by his attorney [or as the case may be], came into our said Court, and said [here recite the pleas and pleadings to the joinder of issue], and the plaintiff did the like. And whereas the sum sought to be recovered in the said action, and indorsed on the writ of summons therein, does not exceed 20*l.*, and it is fitting that the issue above joined should be tried before you the said sheriff of [or Judge, as the case may be]: We, therefore, pursuant to the statute in such case made and provided, command you that you do summon twelve free and lawful men of your county, duly qualified according to law, who are in nowise akin to the plaintiff or to the defendant, who shall be sworn truly to try the said issue joined between the parties aforesaid, and that you proceed to try such issue accordingly; and when the same shall have been tried in manner aforesaid, we command you that you make known to us at *Westminster* [or, to our Justices at *Westminster*, or, to the Barons of our said Exchequer, as the case may be] what shall have been done by virtue of this writ, with the finding of the jury hereon indorsed, on the day of next. Witness , at *Westminster*, the day of , in the year of our reign.

## No. 6.

*Form of Indorsement thereon of the Verdict.*

Afterwards, on the (b) day of , in the year , before me sheriff of the county of [or Judge of the Court of ]. came, as well the within named plaintiff as the within named defendant, by their respective attorneys within named [or as the case may be]; and the jurors of the jury by me duly summoned, as within commanded, also came, and, being duly sworn to try the said issue within mentioned, on their oath said, that

## No. 7.

*Form of Indorsement thereon in case a Nonsuit takes place.*

[After the words "duly sworn to try the issue within mentioned," proceed as follows:—]

And were ready to give their verdict in that behalf; but the said A. B. being solemnly called, came not, nor did he further prosecute his said suit against the said C. D.

## No. 8.

*Form of Judgment for the Plaintiff, after Trial by the Sheriff.*

[Copy the Issue and then proceed as follows:—]

Afterwards, on the (c) day of in the year came the parties aforesaid, by their respective attorneys aforesaid, [or as the case may be,] and the said sheriff, [or, judge, as the case may be,] before whom the said issue came on to be tried, hath sent hither the said last-mentioned writ, with an indorsement thereon, which said indorsement is in these words; to wit,

[Copy the Indorsement,]

Therefore it is considered &c. [in the same form as before.]

(a) Day of trial.

(b) Date of first writ of summons.

(c) Day of signing judgment.

AN  
INDEX  
TO  
THE PRINCIPAL MATTERS  
IN THIS VOLUME.

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ACCOUNT STATED.

See MONEY HAD AND RECEIVED.—  
PLEADING.

An indictment, prosecuted by the plaintiff against the defendant, for a nuisance, having been returned a true bill at one quarter sessions, was traversed to the next. The defendant was not prepared to plead at that period of the second sessions at which by the practice he was bound to do; upon which the counsel for the prosecutor said, he should press for judgment for want of a plea, unless the defendant would pay the costs of the day. The Court said the defendant must either plead and take his trial, or might traverse on the terms proposed by the prosecutor. The parties having come to an agreement, their counsel signed the following memorandum, indorsed on their briefs: "Traversed to the next sessions by consent, the defendant paying the costs of the day, including counsel's fees, the prosecutor giving a

copy of the replication a month before the sessions." The costs were afterwards taxed by the clerk of the peace, and the allocatur served on the defendant. When applied to for the amount, he objected to two items, which were relinquished on behalf of the prosecutor. The defendant's attorney offered at that time to give his check for the residue, but did not, it not being pressed for. On a subsequent application for payment, defendant desired prosecutor's attorney to "*apply to Mr. B. who received his rents, and he would arrange or pay.*" Held, that the arrangement between the parties at the sessions bound the defendant as an agreement, independently of that subsequent order of the Court, which sanctioned it; and therefore that the agreement taken together with the promise to arrange and pay, after ascertaining the amount, afforded evidence for a jury of an account stated. *Porter v. Cooper, E. 1834.*

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## ANNUITY.

The condition of a money bond was for payment to the plaintiff of an annuity of 150*l.* by quarterly payments, after previously reciting that the obligee had contracted with the obligor for sale to him of a messuage, &c. in consideration, among other things, of the annuity; and further, that on the contract of purchase of the messuage, it was agreed that for the better securing payment of the said annuity, the obligor should execute that bond:—Held, that the bond was properly stamped with a 1*l.* 15*s.* deed stamp within 55 *G. 3. c.* 184.

Held also, that the want of inrolment under 53 *G. 3. c.* 141. the annuity act, could not be raised as an objection upon non est factum; and that if it could, it would not prevail, as inrolment was not required under that act, the consideration not being pecuniary. *Mes-tayer v. Biggs*, E. 1834. 466

## APOTHECARY.

See SURGEON.

## APPEAL.

See POOR RATE.

## APPEARANCE.

In order to satisfy the Court under 2 & 3 *W. 4. c.* 39. s. 3. that proper means have been taken to serve a distringas on a defendant, who was a clerk in the victualling office, in order to enter an appearance against him, it should be shown not only that his residence or property could not be discovered, but that attempts had been made to serve him at the victualling office. *Rounsell v. Bower*, H. 1834. 374

By person not attorney of the Court. *Bazley v. Thompson*. 955

Irregularity in appearing by a person who is not an attorney of the court, does not entitle the opposite party to sign judgment, but only to move to set aside the proceedings. *Bazley v. Thompson*, E. 1834. 955

## ARBITRATION.

On *A.* and *B.* entering into an agreement in *France*, a copy of it was deposited by *A.* with a notary at *Paris*. In an action against *B.* on the agreement, evidence was given, that, by the usage of *France*, a document deposited with a notary cannot be removed:—Held, that the agreement was sufficiently proved, by production of a copy of the document so deposited; there being no satisfactory evidence of the fact, that two duplicate originals had been made.

By agreement between *A.* and *B.* made in *France*, any disputes which might arise between them were to be submitted by them to two arbitrators, merchants, [*negotiants*] respectively named by them, who in case of disagreement were to have power to name an umpire. The two or the three referees might also be named by a particular court, at the request of either party:—Held, that that court might appoint an arbitrator, who was not a merchant; and also, that an act by which it annulled *B.*'s nomination of an arbitrator, on the ground that he was a foreigner, and appointed not two other arbitrators, but one, a Frenchman, and not a merchant, to act as referee with the nominee of *A.*, must be taken to be legal according to the *French* law, till the contrary was distinctly proved.

Where on breach of an agreement entered into in *France*, and to be performed there, *French* ar-

bitrators awarded a sum, including the profits which the plaintiff would have made had the agreement been fulfilled:—Held, that that sum might be recovered in an action here on the award, as not being shown to be contrary to French law.

It was deposed, that two out of three provisional syndics may, by the law of France, sue to recover debts due to the bankrupt, and without the previous authority of the *Juge Commissaire*:—Held, that they may so sue in this country, unless the *French* law be shown to the contrary:—Held also, that the act of the two syndics sufficiently implied the absence or want of consent of the third, without showing his absence or want of consent.

Evidence was given, that by French law two out of three provisional syndics may sue for the debts due to the bankrupt, and no contradiction being offered:—Held, that they may so sue in this country.

The declaration averred, that a party, a *Frenchman*, was a bankrupt. The evidence was, that he was only "en etat de faillite," or insolvent:—Held no variance, as the *English* "bankrupt" does not appear identical with the *French* "banqueroute." *Alivon and Another, Provisional Syndics of the estate and effects of Beuwain, a Bankrupt*, v. *Furnival*, T. 1834.

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## ARBITRATION AND AWARD.

An attachment for non-performance of an award was resisted on the ground that an action was pending thereon; but it appeared that the party was in contempt before it was brought, by having before then refused to pay the sum

awarded. The Court granted the attachment on the terms of the plaintiff's discontinuing the action, and paying the costs. *Paul v. Paul*, M. 1833.

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In showing cause against a rule for such an attachment, no objection can be taken to the award, which does not appear on the face of it. *S. C.*

If the reference is of a cause and all matters in difference, the attachment will issue, although the award mis-reciting it be a reference of the cause only; for if any other matter in difference existed, of which the arbitrator had had notice, it would be a ground to move to set aside the award. *S. C.*

A rule to set aside the certificate of an arbitrator should state the grounds of the motion. Where a plaintiff did not give distinct notice of attending an arbitrator by counsel, and refused to consent to an adjournment except on defendant's paying the costs of the meeting, the Court held plaintiff not entitled to such costs, stayed the certificate made by the arbitrator in his favour, and referred the case back to the arbitrator. *Whatley v. Morland*, H. 1834.

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An attachment will not be granted for non-payment of money pursuant to an award, and of costs taxed thereon, till after the order of reference has been made a rule of court. *Chilton v. Ellis*, H. 1834.

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During a trial a plaintiff's counsel proposed to the defendant's counsel that he should consent to a verdict for 100*l.*, without costs on either side. The defendant's counsel conferred with defendant and his attorney, who were in Court, advising them to accept the offer, but both told him it could

not be agreed to. However, the defendant's counsel took on himself to consent to a verdict on the terms proposed, and it was entered accordingly. Held, that as neither the attorney nor the defendant opposed the making the order at the time, except in private conference with their own counsel, no new trial could be granted, even on payment of costs, and a rule obtained for that purpose was discharged with costs. *Wright and another, Assignees of Jackson, a Bankrupt v. Sorsby, executor of Sorsby*, E. 1834. 434

*T.*, the tenant of *F.*, was plaintiff in an action of trespass against *F.*'s land agent for taking possession of *T.*'s farm, held under *F.* *H.* acted as *F.*'s attorney in several suits pending between *T.* & *F.*, and also for the land agent in the action of trespass which was substantially defended by *F.*'s counsel, who held his general retainer, being claimed in that action by the attorney, *H.* At the trial, *H.* having advised with the defendant's counsel, consented to an order of nisi prius imposing certain terms on *F.* It was afterwards moved to set aside the order, which had been made a rule of Court, on affidavits of *H.* and *F.*, that *F.* never gave authority to consent to settle any action or matter in difference between them, but the Court refused to interfere in favour of *F.* in a summary way. *Thomas v. Hemes and others*, T. 1834. 335

In two actions, one on the case for disturbance of common, by inclosing a part, and the other in trespass quare clausum fregit, a verdict was taken generally for the plaintiff, subject to a reference by order of nisi prius of those causes, and of another action of

trespass not then at issue, as well as of all antecedent causes of action between the parties. *H.* a person, as whose servants the defendants had justified in some of these pleas, and who was not a party to either cause, was to be at liberty to become a party to this reference, as was any other person claiming right of common over the locus in quo; the object of the reference being declared to be that the rights of the commoners should be ascertained, secured, and regulated as concerned the parties thereto. In one action of trespass not guilty was pleaded, and a great number of issues were joined, claiming various rights of common. In the other not guilty, and numerous special pleas of justification had been pleaded, though no issues were joined at the time of the reference. The arbitrator awarded for the plaintiff in the action for disturbance of common. In the action of trespass which was at issue, he awarded that the defendants were not guilty of the trespasses; and in that which was not at issue, he awarded that the plaintiff had no cause of action against the defendants. He did not further notice the other issues, or specify any mode of terminating either cause; but proceeded, in pursuance of the terms of the order of reference, to declare in his award the rights of the parties in the causes to enjoy the common, and inclose certain woods in future.

He then directed the party who was the defendant in the first action, and plaintiff in the two others, to pay all the costs attending the reference and award. It was moved, first, to set aside the award as not final, in not having with certainty disposed of all the mat-

judgment obtained in the first action: Held, that he was entitled to be discharged out of custody, though the special bail put in in Ireland had been discharged for a defect in the affidavit to hold to bail. *Gunn v. M'Clintock*, E. 1834. 988  
 Before credit expired, see *Strutt v. Smith*. 1003  
 Second, on concurrent execution. *Lewis v. Morris*. 907

## ASSUMPSIT.

See MONEY HAD AND RECEIVED.

## ATTACHMENT.

See COSTS.

Attachment for costs on award. See ARBITRATION.  
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 Attachment on an award. See ARBITRATION.  
 For non-payment of costs. See COSTS.

## ATTORNEY AND SOLICITOR.

See APPEARANCE.—PRACTICE, (Attorney.)

If less than a sixth is taxed off an attorney's bill, the Court may allow or return him the costs of taxation; and where very nearly a sixth was so struck off, the Court refused the costs. *Baker v. Wills*, H. 1834. 279  
 Where an attorney, who having been employed for the plaintiffs in a cause, had gone on as far as the issue and giving notice of trial, and had laid the facts of the case before counsel for his opinion, was afterwards discharged by his then clients, but not for misconduct; the Court refused to restrain him from acting for the defendant in the same cause, there being no affidavit by the plaintiffs or their solicitor

that the attorney had, while in their employment, obtained a confidential knowledge of particular facts, which it would be prejudicial to their case to communicate to the defendant, or that the case which had been laid by him before counsel contained facts, the disclosure of which by him to the defendant would have a similar effect. *Johnson and another, Assignees of Cochrane, a Bankrupt, v. Marriott*, M. 1833. 78

The contract of an attorney or solicitor retained to conduct or defend a suit is entire and continuing, viz. to carry it on till its termination, and can only be determined by the attorney upon reasonable notice. So that in an action by an attorney for business done in a suit more than six years before the commencement of the action, the Statute of Limitations 21 Jac. 1. c. 16. s. 9, is no bar when no such notice was given, and the suit did not terminate till within six years before the action was brought. *Harris and another, Executors of the Will of Wilson, deceased, v. Osbourn*, E. 1834. 445

A person who had been admitted an attorney before 11 G. 4. and 1 W. 4. c. 74. (23d July 1830,) and had taken out his certificate to practise in a court of great session in Wales, but had ceased to practise, and was not "then practising:" Held that he was not entitled to be inrolled an attorney of a superior court under s. 16. of that act. *Ex parte Garratt*, H. 1834. 282  
 An attorney sued jointly with a person not privileged from arrest, does not, since 2 W. 4. c. 39. s. 4. lose his own privilege by that circumstance; for he may now be served with a copy of the capias on which the other defendant is arrested; and where an attorney

bail became severally bankrupt, and obtained their certificates. On motion to have the bail-bond delivered up to be cancelled, and to enter an exoneration on the bail-piece, Held, that as the bankruptcy and certificates of the bail were not disputed, the Court would relieve them under the powers of 4 & 5 Ann. c. 16. s. 20. by staying proceedings on the bail-bond; though they would not order it to be delivered up, as the plaintiff was entitled to keep it in order to claim to prove in respect of it under the fiats; and the Court moulded the rule accordingly, without calling on the bail to pay costs. *Slatter v. Scott*, H. 1834.

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Debt on bail-bond. See PLEADING.

### BALLOT.

*Charlesworth v. Rudgard*. 822

### BANKRUPT.

See COVENANT IN LEASE.

In an action by a messenger to a commission of bankrupt, against the assignee appointed under 6 G. 4. c. 16. to recover the costs of advertising a meeting of creditors, and of hiring a room for them to assemble in, it is sufficient to prove the plaintiff's appointment, and that the expenses incurred by him were reasonable, without proving express employment or recognition of him as messenger by the assignee. *Hamber v. Purser*, M. 1833. 41

A person who had been discharged under an insolvent act in 1815, became bankrupt in 1829 (3 G. 4.) and obtained his certificate, but paid less than 15s. in the pound. He afterwards became possessed of property: Held, that his assignees under the commission were entitled to recover under s. 127

of 6 G. 4. c. 16. which has for that purpose a retrospective effect, notwithstanding the interest previously vested in the assignee under the insolvent act. *Elston and others, Assignees of Elston, a Bankrupt*, v. *Eliza Braddick*, H. 1834. 123

### (Order and Disposition.)

*G. R. S.* having advanced money to *M.* received from him, by way of security, an assignment of his equitable life interest in certain stock, standing in the names of three trustees under a marriage settlement, and in a mortgage vested in the same trustees. The solvency of *M.* becoming doubted, one of the trustees, and a relation of *G. R. S.* spoke to him on the subject, when *G. R. S.* in the course of the conversation, and without any view of giving validity to the security he held, told him that he held the above-mentioned assignment as a security for his advances. *M.* having afterwards become bankrupt, Held that this statement, though made to a person who was not the acting trustee, sufficed to prevent the stock and mortgage from being in the order and disposition of *M.* at the time of his bankruptcy, and consequently from passing to his assignees. *G. R. Smith v. Smith and others*, M. 1833. 52

Effect of certificate in discharging him from costs. 652

Assignees, use and occupation by. *Jacobs v. Phillips*. 673

Payments to, with reference to 6 G. 4. c. 16. s. 82. *Cromfoot v. London Dock Company*. 967

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### BANKRUPTCY.

See SUPERSEDEAS.

*Stephens v. Pell*, 2.

## BILLS AND NOTES.

See PRACTICE (Rule to compute.)—  
PLEADING.

A bill having been originally accepted, payable at the acceptor's own house, *King's Road, Chelsea*, was afterwards altered by him at the instance of the payee, and was made payable at *Mr. Bland's, Great Surrey Street, Blackfriars*: Held, in an action by payee against acceptor, that the alteration was immaterial, and did not vitiate the bill. *Walter v. Cubley*, M. 1833.

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Where a bill-broker receives a bill from his customer merely to get it discounted, he has no right to mix it with bills of other customers, and pledge the whole in a mass, in order to secure a loan of money to himself. Still less has he a right to deposit bills received merely for the purpose of discount, as a security, or part security for money previously due from him; and the pawnee receiving the bills from him with reasonable ground of suspicion, à fortiori with knowledge of the limited authority on which he held them, cannot detain them against the customer who deposited them with the bill-broker. *Haynes v. Foster*, M. 1833.

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A subscribing witness to a promissory note expressed to be payable on demand for "value received," proved that just before it was signed, the maker was requested by the payee to give it him in lieu of a legacy left him by the maker, who was then very ill, for the trouble he would have in acting as his executor. The payee having died before the maker, Held, that the payee's executors could not recover on the note against those of the maker. *Solly and*

*others, Executors of Chandler, v. Hinds and another, Executors of Underdown*, H. 1834.

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A bill was drawn on the consignees of a cargo of coals shipped to *Rochester* by the broker at *Newcastle*, who had effected the purchase there. That bill was returned to the payees, the coal owners, unaccepted, on account of the date being too short. The broker having directed the payees to prepare another bill at a longer date, they did so, and sent it to his counting-house in *N.* for his signature. The broker had in the meantime left *Newcastle* in pecuniary embarrassment, and his brother, the defendant, had come to the counting-house to investigate his affairs. The defendant, in the absence of his brother, and at the request and for the convenience of the plaintiffs, signed the bill they had prepared without qualification of his liability: Held, that he was personally liable as drawer to pay the bill. *Somerby and others v. John Butcher*, H. 1834.

320

A bill accepted payable at a *London* bankers, indorsed in blank by the payee, was indorsed over by subsequent holders, who added these words, "In need *Smith, Payne, & Co.*" to their indorsement. It was afterwards indorsed in blank several times, and at last to the *Liverpool* bank, who indorsed it specially, "Pay Messrs. *Terney and Farley* or order." *Terney and Farley* indorsed in blank to plaintiff, writing thereon "*Thomas Terney and Farley*." It was afterwards indorsed in blank to several others, and when due was duly presented at the *London* bankers, at which it had been made payable. The answer was "no advice." On the same day it was presented, according to the previous memorandum, to *Smith*,

*Payne, & Co. London* bankers, who refused to pay it, on the ground of the mis-spelt indorsement of *Terney* and *Farley*. The case stated between the parties admitted the custom of *London* bankers to be to refuse payment of all bills, even those accepted by themselves, if the indorsement be not correct to a letter. Due notice of dishonour being given to the plaintiff, the bill was returned to him, and he gave due notice of dishonour to the *Liverpool* bank, who subsequently pointed out the irregularity to the plaintiff. By their advice he sent the bill to *Terney* and *Farley* in *Ireland* to rectify, and indorse it *Terney* and *Farley*. They did so, and the bill was sent up to *Smith, Payne, & Co.* who refused payment as overdue: Held, that the bill having been regularly presented and dishonoured, and due notice of dishonour given to the *Liverpool* bank, they were liable to pay the amount to the plaintiff. *Leonard v. Wilson*, E. 1884. 416

The cases enumerated by 3 & 4 Ann. c. 9. s. 1. in which promissory notes cannot be assigned, are instances only. *Dickenson v. Teague*, E. 1834. 450

Suing one party to a bill after paid by another. *Monek v. Benham*. 812

Pleading want of consideration. *Easton v. Pratchett*. 472

In assumpsit by the indorsee against the indorser of a bill of exchange, it is a bad plea to plead that the action was commenced before a reasonable time had elapsed for the defendant to pay the bill after notice to him of the non-payment; for the cause of action accrued against the defendant immediately on his receiving the notice of dishonour. *Siggers v. Lewis*, T. 1834. 845

*Quere*, if a tender promptly made within a reasonable time after such notice received, would be a defence to an action even for nominal damages only for non-payment in the interim? *S. C.*

If a notice of dishonour is sent by post on the day on which the party ought to receive it, the onus is on the vendor to prove affirmatively that the letter was put in in time to reach the party that day, according to the course of the post. *Fowler v. Hendon*, T. 1834. 1002

Where a promissory note was made payable to *D.* or bearer on demand *at sight*, it was held that the latter's words could not be rejected, and that no action could be maintained without proving presentment for sight. *Dixon v. Nuttall*, E. 1834. 1013

### CARRIERS.

A case containing a looking-glass of above 10*l.* value, marked on the outside "Plate Glass," &c. and directed to "Col. *Shedden, Elms, Lymington*," was delivered at the office of the defendant, a common carrier in *London*, and booked there to go by his waggon. Its size was considerable, and its weight five cwt.; a notice was fixed in the carrier's office, pursuant to 11 *Geo. 4.* and 1 *Will. 4.* c. 68; no price was paid for its carriage, but for booking only; no declaration of its nature or value was made on behalf of the plaintiff pursuant to section 1 of the act; nor was any increased rate of charge for the greater risk and care incurred in its conveyance, or any engagement to pay the same asked or accepted by the defendant's servant on receiving the package. It arrived in *Lymington*, and was forwarded from thence on a narrow truck without springs, along a smooth road to the *Elms*,

where it was discovered to be broken. The jury found negligence, and gave the plaintiff a verdict for the value of the glass: *Held*, on motion to enter a nonsuit, that the nature and value of the article in the case not having been declared at the time of delivering it at the defendant's office, and gross negligence not being found by the jury, the carrier was protected by the express words of 11 *Geo. 4.* and 1 *Will. 4.* c. 68. s. 1. *Owen v. Burnett*, H. 1834. 134

### CERTIFICATE.

See ARBITRATION AND AWARD.

### CHARGING IN EXECUTION.

*Hewitt v. Melton*. 1009

### CHURCHWARDEN.

A churchwarden cannot, by ordering repairs to be done to a parish church, render his co-churchwardens liable without their consent, and if he does he is personally liable. *Northwaite, Executor, &c. v. Bennett*, H. 1834. 236

### CLERK

To turnpike trustees, liability of. *Emery v. Day*. 696

### COGNOVIT.

See ERROR.—PRACTICE (*Cognovit*.)

### COMMENCEMENT OF SUIT.

*Dickenson v. Teague*. 450

### COMMISSIONER UNDER LOCAL ACT.

A local act directed that no person should be capable of "acting as a commissioner in execution thereof, in any case wherein he should be personally interested in the matter in question," and that any person who should so act as a commis-

sioner, being so disqualified, should forfeit 100*l*. The commissioners were in part elected by parishes within a certain precinct. An order had been made by them for constructing a footway in a particular manner along the frontage of the defendant's, among other, premises. The defendant, who was afterwards elected a commissioner, attended at a special meeting of the commissioners, and first moved to rescind the order as to all except his own premises, which was negatived. On a motion being made to alter the order, by adopting a less expensive mode of paving, he supported the proposition in a speech, and took an active part in the discussion, and in opposing the original order. He then proceeded to the ballot with the other commissioners. In an action of debt for the penalty, there was a count charging the defendant with acting as a commissioner in a matter where he was personally interested, and voting accordingly. Another count only charged him with acting as such commissioner in a matter in which he was personally interested. The jury found that the defendant did not vote on the occasion in question, and gave him a verdict: *Held*, that he did not act as a commissioner in proposing the rescinding the order, except as to his own premises; but that there was evidence that he had "acted" as a commissioner by addressing the meeting on the motion for altering the order, and by taking an active part in the discussion; and that as the only question left to them was, whether he had voted, and not whether he had acted as a commissioner in any other manner, he was entitled to a new trial. *Charlemouth v. Rudgard*, T. 1834. 822

The evidence of a person who proceeds to a ballot is admissible as to the share he personally took in it. *S. C.*

*Semble*, the addressing commissioners of paving by a commissioner in complaint of a grievance affecting him individually, is not "acting" as a commissioner. *S. C.*

#### COMMON.

See *WOODS*.

#### COMPOSITION.

By agreement not under seal between the plaintiffs and other creditors of the defendant, with the defendant and his surety, the latter agreed to pay them a composition of 15s. in the pound at two fixed dates, and in consideration of the creditors agreeing to discharge the defendant from all his debts and demands on receiving the 15s. in the pound, the surety undertook to pay a sum down in part payment of the first instalment, and to accept a bill drawn by the defendant in part payment of the second; the creditors thereupon agreeing "to exonerate and discharge the defendant on payment of the said 15s. in the pound." It was next agreed that some bills (and a note) which if paid would have satisfied the residue of the composition money, and which had been indorsed and handed over to the plaintiffs by the defendant before the composition, "should be considered as part payment of the said 15s. in the pound." Held, that the defendant still remained liable on such of those securities as were not paid at maturity by other parties to them. *Constable and another v. Andrew*, H. 1834. 206

#### CONCURRENT WRITS.

See *Lewis v. Morris*.

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#### CONFIDENTIAL COMMUNICATION.

See *LIBEL*.

#### CONTINGENT REMAINDER.

See *DEVISE*.

#### CONTINUANCES.

See *LIMITATIONS*.

#### COPY OF AGREEMENT.

If one of the parties to a cause has the only copy of his agreement with his adversary, he should give him a copy, when applied for, without imposing terms, or a judge at chambers will compel him to do so. *Reid v. Coleman*, H. 1834. 274

#### COPYHOLD.

See *MONEY HAD AND RECEIVED*.

#### COSTS.

After a defendant has consented to withdraw a juror, and consequently to pay his own costs, it is too late to move that the plaintiff's attorney do pay his costs of defence on the ground that the plaintiff never authorized him to sue the defendant. *Hammond v. Thorpe*, T. 1834. 836

The trial of a cause was postponed by order of a court of nisi prius, on the defendant's application, on the terms of his paying the plaintiff his costs of the day. The order of nisi prius was made a rule of court, and the costs were taxed, after which the defendant became bankrupt: Held, that he was discharged by his certificate, as to these interlocutory costs so ascertained before the bankruptcy. *Jacob v. Phillips*, T. 1834. 652

A certificated bankrupt cannot be discharged from arrest for a debt covered by his certificate, till

it has been inrolled pursuant to 6 G. 4. c. 16. s. 96. S. C.

By the proper construction of Reg. Gen. *Hil. 2 W. 4.* No. 74. a defendant is not entitled to general costs of issues found for him, including the witnesses, or to the costs of witnesses whose testimony was only in part applicable to those issues, but the plaintiff has a right to general costs in respect of the issues found for him. *Lardner v. Dick*, H. 1834. 259

Attachment will be issued for not paying costs in ejectment on the master's allocatur after judgment as in case of a nonsuit, though no subpoena solvas has issued against the nominal plaintiff. *Doe d. Floyd v. Roe*, M. 1833. 85

Issues were joined in fact and in law, and notice of trial of the former given; but the plaintiff having gone to trial, paid the costs of the day on motion in the subsequent term. In that term the demurrer was argued, and the defendant had leave to amend on payment of costs. The master disallowed all the plaintiff's costs of the paper books and briefs which related to the issues in fact, and was held right. *Jones v. Roberts, executrix*, H. 1834. 310

In an action on an attorney's bill, the bill had been delivered, but an order for better particulars, by adding the dates, was granted, on defendant's paying for the same. The plaintiff charged for drawing as well as copying the amended particulars of the bill. The master allowed the copying only, and was held right. S. C.

Where in the copy of an attachment for non-payment of costs, pursuant to the master's allocatur, which was served on the defendant *Calvert*, the final t of his name was omitted, and that of the master was stated to be *Day* instead of

*Das*, the court set aside the attachment and discharged the defendant, though in the original rule the names were spelt right. *Rex v. Calvert, in a cause of Smith v. Calvert*, M. 1833. 77

By order of a baron, made pursuant to 2 G. 2. c. 23. s. 23. proceedings in an action on an attorney's bill were staid on payment of what should be found due by the master, without embodying in the order the defendant's submission or undertaking to pay the sum which should be found due on taxation. He, however, signed the usual submission to that effect in the book kept for that purpose at the baron's chambers. On the taxation an allocatur was made in favour of defendant for 6d. That taxation was reviewed under an order granted by another baron, and the master then made an allocatur for 18l. to the plaintiff. The plaintiff made that order a rule of Court, served it on defendant, demanded the costs, and, on non-payment, obtained an attachment without making the original order of submission in the judge's book a rule of Court: Held, that the attachment issued on sufficient materials, and the Court set it aside accordingly; but they afterwards upheld another attachment obtained after the first order and submission had been made a rule of Court: both rules having been served on defendant, and a fresh demand of the costs made. *Ryalls v. Emerson*, H. 1834. 364

Personal demand on the party liable to pay costs under the master's allocatur, is essential before an attachment can be moved for non-payment of costs. *Stannell v. Tower*, T. 1834. 862

A defendant may move for costs of the day for not proceeding to trial pursuant to notice, though the

plaintiff has subsequently gone to trial, obtained a verdict and signed final judgment, if the cause is still in existence from the plaintiff's not having taxed his costs or obtained the fruits of execution.

*Redis v. Lucock*, H. 1834. 281

Costs of taxing attorney's bill. See ATTORNEY.

Costs in action for mesne profits. See MESSNE PROFITS.

Costs of several counts. See SLANDER.

Costs to defendant when arrested for larger sum than recovered. 216, 222, 231.

Costs payable by executors for not proceeding to trial. 224

Security for. See SECURITY.

## COUNTS.

Superfluity of, subject of motion, not demurrer. *Gardner v. Bowman*. 412

## COURTS OF REQUESTS.

The London court of requests acts 3 Jac. 1. c. 15., 14 G. 2. c. 10., 39 and 40 G. 3. c. 104., confer jurisdiction over liquidated demands, though there are special counts; but not in cases where unliquidated damages are sought to be recovered; as on a count for not returning goods unsold. *Postan v. Masser*, E. 1834. 999

CREDIT, see 315.

*Simpson v. Penton and Strutt v. Smith*, 1002.

See SALE OF GOODS.

## CROSS ACTION.

See PLEADING.

*Chappel v. Hickes*. 43

## CUSTOM OF THE COUNTRY.

See USE AND OCCUPATION.

## COVENANTS.

See EXECUTION.

## COVENANT IN LEASE.

It is no defence at law to an action on an indenture of lease by the trustee of a party who has become bankrupt, that the defendants, the lessees, have performed their covenants with the assignees of the cestui que trust. *Daniel Mallet Britten, administrator of J. Saunders, v. Daniel Britten, Perrot, and Watts*, E. 1834. 473

## DEBT, ACTION OF.

In an action of debt on a judgment of an inferior court, the declaration is bad on demurrer, if it does not contain an averment that the cause of action arose within the jurisdiction of the court below: it is not enough to allege that the plaintiff recovered his damages within that jurisdiction. *Read v. Pope*, E. 1834. 403

The words "undertook and agreed to pay" in a quantum meruit count, do not necessarily import the form of action to be assumpsit, but are good in debt. *Gardner v. Bowman*, E. 1834. 412

In an action of debt it is immaterial that the aggregate of the sums claimed in several counts exceeds the amount claimed in the *queritur*. S. C.

No objection on the ground of superfluity of counts, can be taken on demurrer, but it must be the subject of motion. (Reg. Gen. Hil. 4 W. 4. No. 6.) S. C.

## DE INJURIA.

See PLEADING.

## DEMISE.

Occupation not evidence of. 780

## DEMURRER.

See PLEADING.—PRACTICE.

Arguing. See *Darling v. Gurney*. 2

## DEPOSITIONS.

Before commissioners of bankrupt.  
581

## DETINUE.

A plea in detinue, that plaintiff did not deliver the goods to the defendants, is bad on general demurrer. *Walker v. Jones and others*, E. 1834. 915

## DEVISE.

*R. B.* devised freehold premises to his wife during her life or widowhood, and after her death or marriage, to his nephew *R. B. R.* for life, and from and after his decease "unto and equally between all and every the children of his said nephew *R. B. R.* lawfully begotten, their heirs and assigns respectively, as tenants in common," if more than one, and if but one, then to such only child, his heirs and assigns; but in case there should be no child or children of his said nephew *R. B. R.* living at the time of the decease or marrying again of his the testator's said wife, then he devised over to his executors in trust for other persons. The residue was devised to certain other persons. By codicil dated and executed on the same day as the will, duly attested so as to pass real estates, the testator directed "*That neither the said R. B. R. nor any or either of his issue, shall, by virtue of this my will, take or be considered as entitled to a vested interest or interests, unless and until they shall respectively attain the age of 21 years.*" *R. B. R.* the nephew attained 21, married, had children in the lifetime of the testator's widow, and survived

her, as did his children. At her death he entered into possession of the devised estate, and afterwards died, leaving five children surviving him, all infants; and having by will devised all freehold estates of which he might be seised, and over which he might have a disposing power, to certain persons, upon trusts mentioned in the will: Held, that the devices substituted by the will for those previously made to the children became void, the events contemplated not having happened; and that the estates devised to the children by the will being rendered contingent by the codicil, failed of effect for want of a particular estate of freehold to support them at the death of *R. B. R.*; so that the fee passed by the will of the testator's heir at law. *Russel v. Buchanan and others*, E. 1834. 384

## DIRECTIONS TO TAXING OFFICERS. 376

## DISCLAIMER.

Land belonging to the father of the lessor of the plaintiff had been held by his leave, and under him, by the father of the defendant, from 1812 to his death in 1821, on an understanding that a lease was to be granted. After that event the land remained in possession of the defendant till the death of the father of the lessor of the plaintiff in 1829, and from that time till the ejectment delivered. No claim or payment of rent or acknowledgment of tenancy by either the defendant or his father was shown. No demand of the possession from the defendant was shown; but in order to show that the defendant had determined the tenancy by disclaimer, the lessor

of the plaintiff put in a letter from the defendant and two more from his agents. In the first, the defendant stated, that the facts not being within his knowledge, he had referred them to his solicitors, and had requested them to communicate with the lessor of the plaintiff. The second letter to him from the solicitors ran thus:—The defendant has given us a letter from you on the subject of some ground you state to have been let by your father in 1811, and which has ever since been in the possession of his lordship's family. We will thank you to let us have the proofs that it was not the late lord's own. The other letter from one of the solicitors requested further information as to the late Mr. Lewis having a right to let the ground to Earl C.: Held, that those letters did not amount to an admission of an antecedent disclaimer, and that if they did, they would not be sufficient for that purpose, being written after the day of the demise laid in the declaration.

The letter of the defendant did not authorize his solicitor to bind him by any disclaimer. *Doe d. Lewis v. Earl Cawdor*, T. 1834.

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*Semble.* If an admission of a disclaimer is made after the day of the demise, it must recognize a disclaimer as having been made antecedent to that day, or it will not determine a tenancy. S. C.

## DISTRESS.

Withdrawing. See *Stephens v. Pell*.

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For poor-rate. *Priestley v. Watson*.

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## DUPLICATE ORIGINALS. 751

See EVIDENCE.

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## EFFECTS.

See *Lewis v. Rogers*.

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## EJECTMENT.

See MESNE PROFITS.

A declaration in ejectment must begin and conclude with the *quo minus* clauses, as before 2 W. 4. c. 39. the uniformity of process act, the general rules of Mich. 3 W. 4. No. 15. not being applicable to any but actions merely personal. *Doe d. Gillett v. Roe*, T. 1834.

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An ejectment was brought and notice of trial given in *December* for the next assizes, but without paying the taxed costs of a former ejectment, brought for the same premises by the defendant against the lessors of the plaintiff, in which judgment had been had against the casual ejector, and possession delivered to the defendant. A rule afterwards obtained for staying the proceedings in the second ejectment till such costs were paid, together with those of an action for mesne profits, was made absolute. Such a rule will not be enlarged in order to set off the costs claimed against any to which the lessors of the plaintiff may become entitled on the trial of the second ejectment. (See Reg. Gen. Hil. 2 W. 4. No. 93.) *Doe d. Maslin v. Packer*, H. 1834.

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## ENTRY.

See EVIDENCE.

## ERROR.

When a defendant, against whom judgment had been signed on a *cognovit*, in which he agreed not to bring a writ of error, or delay execution, brought a writ of error notwithstanding: Held, that the allowance of that writ of error was

4 A

the course of business, is not admissible evidence of the place at which the arrest took place after the death of the officer, in an action between third persons. *Chambers v. Bernasconi and others*, T. 1834. 531

Depositions taken before commissioners of bankrupt, and inrolled by the assignees according to 6 Geo. 4. c. 16. s. 96. are not evidence against them in an action brought to dispute the commission, by disproving the act of bankruptcy on which it is founded. S. C.

A trader and small farmer being embarrassed in her affairs and pressed by a creditor, assigned "all her effects, stock, books, and book-debts," for the benefit of her creditors, and at the same time dictated a list of persons whom she stated to be creditors of her estate. The assignee having dealt with the property after her death, was sued by one of her creditors as executor de son tort: Held, that the list was evidence as part of the transaction of the assignment in order to establish the bona fides of it, and so justify the defendant's intermeddling. *Lewis v. Thomas Rogers, Executor of Elizabeth Rogers, deceased*, T. 1834. 372

Held also, that cattle on the farm passed by the word "effects." S. C.

## EXCISE INFORMATION.

See FORMA PAUPERIS.

## EXECUTION.

The attorney for a defendant who was in custody on final process, obtained the consent of the plaintiff's attorney not to charge him in execution in the term in which that step ought to have been

taken, on the false representation that he had the defendant's authority and consent to take no advantage of his not being charged in execution till the next term. The defendant's attorney signed an undertaking to that effect, which, however, did not state that the proceedings were stayed at the defendant's request, pursuant to Reg. Genl. of this court, *Hil. 26 & 27 G. 2.* The defendant was not charged in execution till the next term, and was afterwards discharged on the ground of the above omission in the undertaking. An action having been brought by the plaintiff against the defendant's attorney for damages accruing from the defendant's discharge by the false representation of the defendant, it was held that it could not be maintained, for the damage laid arose from the informality of the undertaking. *Hewitt v. W. Melton*, E. 1834. 1003

Two writs of ca. sa. were issued at one time into *Anglesea* and *Carnarvonshire*. The debtor was arrested in *Anglesea* on 1st November, and having paid debt and costs to the sheriff, was discharged. The next day he was arrested in *Carnarvonshire* on the other ca. sa., and was detained in custody till the 15th, when the debt and costs were paid over to the creditor's attorney, several days after he had been acquainted with the previous facts. The debtor then sued the creditor and her attorney in case for malicious non-feazance, in not giving notice to the sheriff of *Carnarvonshire* that the writ issued into *Anglesea* had been executed or the judgment satisfied, and that the writ directed to him was not to be executed: Held, that in the absence of proof that before the second arrest, any notice had reached the creditor or

her attorney of the first arrest, or of the payment of the debt and costs, or that at any time before his discharge the plaintiff had applied to either for a countermand of his imprisonment, which had been thereupon maliciously withheld, he could not maintain the action. *Lewis v. Grace Morris and Lloyd Roberts*, E. 1834. 907

*Seemle*, the discharge by the sheriff of *Anglesea* without the consent of the plaintiff was illegal. S. C.

*Seemle*, also, that the second arrest might have been set aside on application to a judge. S. C.

## EXECUTORS AND ADMINISTRATORS.

See *USE AND OCCUPATION*.

Where in an action commenced by an executor before 1st June 1833, he sued necessarily in his representative character, and declared only on promises to his testator in his life-time, judgment as in case of a nonsuit was obtained in November 1833, but the executor took no step after 1st June in that year: Held, that he was not liable to pay the whole costs of the cause, but only such costs as had been occasioned by his own negligence in not proceeding to trial. *Pickup and another, Executors, v. Wharton*, H. 1834. 224

The expenses which executors will be justified in incurring about the funeral of the deceased when his estate turns out insolvent, must be reasonable, according to the circumstances of each particular case, with reference to the testator's condition in life. *Edwards v. Edwards, Administratrix with the Will annexed of Henry Edwards, deceased*, E. 1834. 438

Where in an action against the personal representative of the vo-

luntary grantor of an annuity, plene administravit was pleaded, the defendant claimed an expenditure of 103*l.* on the funeral of the deceased, who died worth 2987*l.*, but whose rank in life did not appear. S. C.

*Seemle*, that that sum could not be allowed to the personal representative against a claim for an arrear on the annuity deed. S. C.

Nor can items for expenses of reconveying mortgaged premises to the real representative of the mortgagor, and for costs of ejectments brought to recover them, be allowed. Nor a payment by the personal representative out of the assets on account of interest due on a mortgage created by the father of the deceased before the estate descended to the latter. S. C.

*Assumpsit* against executrixes, for work and labour done for the testator. Plea, that a judgment had been obtained against the testator in his life-time, and that the defendants had fully administered, &c. except as to chattels of small value, not sufficient to satisfy the judgment. Replication, that the testator paid a large sum, to wit, 200*l.*, in full satisfaction and discharge of the debt recovered and of the judgment, and that the defendants deceitfully and with the intention to deceive and defraud the plaintiff of his damages, have deferred and still do defer procuring acknowledgment of satisfaction to be entered of the said debt, or to be released therefrom, and still permit the said judgment thereon to remain in full force. Rejoinder, traversing the payment of the said sum in full satisfaction and discharge of the debt recovered, and of the judgment, was held bad on demurrer; for the material fact to be traversed was

the keeping on foot the judgment by fraud; whereas the payment in satisfaction was immaterial and not traversable, being mere inducement. *Jones v. Roberts and another, Executrixes*, M. 1834. 48

An executor who pleads non assumpsit and plene administravit, is entitled to the general costs of the cause, if he succeeds on the latter plea. *Iggulden v. Terson*, H. 1834. 309

*Semble*, no affidavit is necessary to substantiate between counsel what terms were offered or accepted by them on the hearing of a cause. S. C.

Two of four co-executors proved the will, and sued for goods sold and delivered, and work and labour done by the testator. The other two released to the defendant, who pleaded the release puis darrein continuance: Held, that before the Court would take the plea off the file, the plaintiff must make out a case of fraud. *Herbert and another, Executors, v. Pigot, bart.* H. 1834. 285

Where an executor agrees with a legatee to allow him interest on his legacy if he will permit it to remain in his hands, it becomes a loan to the executor, for which he is personally liable at law, and cannot plead plene administravit in bar to an action by the legatee. *Wasney, Clerk, Executor of Andus, v. Earnshaw*, T. 1834. 804

In covenant against an executor, sued as an assignee for breaches of covenants to pay rent and to repair, incurred in his time, it was pleaded, that the defendant was executor of the lessee, that the premises vested in him as such executor only, and not otherwise, that the profits of the demised premises at the time he became executor, and since that hitherto, were less than the rent reserved,

and that the defendant had paid to the plaintiff before commencing the suit 255*l.*, being all that remained in his hands of the said profits by him at any time received therefrom, and that he had never since received any such profit: Held on special demurrer, to be insufficient, for not stating that the defendant had no other assets of the deceased which had come to his hands as executor to be administered. *Reid v. Tenterden (Lord)*, M. 1834. 111

See *Remnant v. Bremridge*, 8 Taunt. 191; *Tremeere v. Morison*, 1 Bing. New C. 89.

In two other pleas, the defendant added to the above statement, that the sum of 255*l.* so paid before the commencement of the suit was all the money which remained in his hands, not only on account of the profits of the premises received by him, but of all the goods and chattels which were of the deceased which had come to his hands to be administered; and that he had not at the time of the commencement of the suit, or at any time since, any profits or goods and chattels of the deceased in his hands to be administered: Held, on special demurrer, insufficient, for not stating that during the interval between the payment of the 255*l.* and the commencement of the suit, defendant had no assets. *Reid v. Tenterden (Lord)*, M. 1834. 111

*Semble*, an offer by an executor to a lessor to surrender to him a lease granted to his testator, is an answer to an action of covenant against him as assignee for breaches of a covenant to repair, as to all breaches accruing after that offer. S. C.

#### EXTENT.

A fiat for an extent having been

granted more than a year before application for an extent, the Court refused to grant a rule that an extent might issue tested of the day on which the fiat bore date. *Rex v. Maberley*, T. 1834. 345

### FALSE IMPRISONMENT.

Where the master of a school refuses to deliver up the person of a boy to his parent, on account of a quarter's schooling not having been paid according to contract; but there is no evidence that the boy was present at the refusal, or knew that his mother had wished to take him home and been refused, or was in any way restrained though kept at school during the *Christmas* fortnight; an action for false imprisonment cannot be maintained by him. *Daniel Herring, an Infant, by W. H. Kimber, his next Friend, v. Boyle*, T. 1834. 799

### FOREIGN LAW.

Evidence of. *Alivon v. Furnival*. 751

### FORFEITURE.

A termor, after deserting the demised premises, delivered up the possession of them, with the lease, to a party who claimed by a title adverse to that of the landlord, with intent to assist him in setting up that title, and not that he should hold *bonâ fide* under the lease: Held, that the term was forfeited by the act of betraying possession. *Doe d. Ellerbrock v. Flynn*, T. 1834. 619

### FORMA PAUPERIS.

A defendant in an excise information may defend in *forma pauperis* on an affidavit that he is not worth 5*l.* over and above his apparel, and without certificate by counsel that he has merits. But such a defendant is not entitled to a copy

of the information, and can only have it read over to him by the officer, in order to his pleading then or at a future day. *Attorney General v. Duffy (Revenue Case.)* H. 1834. 234

### FRAUDS, STATUTE OF.

*A.* went to *B.* on 20th *July*, to treat with him for an engagement as farming bailiff. *B.* handed to him a paper on which the proposed terms of service were written, but it was not signed by either party. *A.* asked when he was to come. *B.* said on the 24th. *A.* made no objection, but took the paper away with him, and came into the service on the 24th: Held, that this was an agreement on the 20th for a service for a year from the 24th, and as the memorandum was not signed by the party to be charged, it was not valid by section 4 of the statute of frauds, 29 *Car.* 2. c. 3. *Snelling v. Lord Huntingfield*, T. 1834. 606

The plaintiff and defendant went together to the shop of *A.*, who knew the plaintiff but not the defendant. The plaintiff having introduced defendant, said in his presence to *A.* "Have you any objection to supply this gentleman with some furniture? If you will, I will be answerable for it." *A.* asked how long credit would be wanted? Plaintiff replied, "I will see it paid at the end of six months;" adding, it would be about 40*l.* or 50*l.* *A.* sent goods to the defendant's house, and no payment having been made by the defendant within six months, applied to the plaintiff for the amount, without previously requesting defendant to pay. The plaintiff having paid the amount: Held, that a jury was well warranted in finding that the credit was given

by *A.* not to defendant, or to him and the plaintiff jointly, but to the plaintiff, whose promise to pay was therefore original, and not collateral only, so as to require any writing within the statute of frauds, 29 C. 2. c. 3.; and therefore that the plaintiff might recover the amount against the defendant as for money paid at his request. *Simpson v. Penton*, H. 1834. 315

*Semble*, the circumstances of each case must be considered in deciding whether a contract be original or collateral. *S. C.*

#### FRENCH BANKRUPT, 751.

#### GAME.

See *TRESPASS*.

#### GUARANTEE.

The following guarantie was given by the defendant in *Jan.* 1825 to certain bankers:—"Please to open an account with, and honour the cheques of *H. B.* on *Mill* account, for whom I will be responsible." The account having been opened, the bankers made advances to *H. B.* from time to time till *Feb.* 1827, when they ceased. A large balance was then due to them from *H. B.*, who in *October* of that year paid a sum into the bank on account of it. In *Feb.* 1828 the bankers took an acceptance from *H. B.* at three months for the balances of his account with interest, without the defendant's knowledge. In several previous instances the bankers had taken similar acceptances from customers who had overdrawn their accounts; but though the defendant had been consulted by them as their attorney on the dishonour of several of them, it was not shown that he was aware of the practice of the bank in that

particular:—Held, that the taking the acceptance from the principal debtor by the parties guaranteed, without the knowledge or assent of the surety, was a giving time to the principal, which altered the situation of the surety, and therefore discharged him from liability on the guarantie. *Howell and another, Assignees of John Waters and David Jones, Bankrupts, surviving Partners of Robert Waters, deceased, v. William Jones*, T. 1834. 548

#### HABEAS CORPUS.

It is no ground for bringing up a prisoner by habeas corpus, that the sheriff's warrant to the officer and gaoler, under which he was arrested and detained, did not state the court out of which the writ issued, it not being shown that a copy of the process was not delivered to him at the time of executing it, pursuant to 2 W. 4. c. 39. s. 4. *Ashby v. Goodyer*, E. 1834. 414

#### IF ANY.

Effect in pleading. *Gould v. Lasbury*. 863

#### INCLOSURE.

See *WOODS*.

#### INFERIOR COURT.

See *DEBT*.

The court will remove a judgment from an inferior court, in order to issue execution thereon, pursuant to 19 G. 3. c. 70. s. 4.; though part of the debt has been levied by process from the inferior Court. *Knowles v. Lynch*, E. 1834. 477  
Action of debt, on judgment of. *Read v. Pope*. 403

#### INQUIRY, WRIT OF.

No affidavit of merits is required where the execution of a writ of

agreed with an attorney, who was one of his creditors, and held a cognovit for his debt, to procure and conduct his discharge under the insolvent debtors' act, and that the debt should be omitted from the schedule, and the operation of the cognovit suspended till after the discharge had taken place, when it was to be revived. After the party's discharge, judgment was entered up and execution issued. The Court set them aside with costs. *Tabram, Gent. one &c. v. Freeman*, H. 1834. 180

### INSPECTING AGREEMENT.

See COPY AGREEMENT.

### INSURANCE; (LIFE.)

Before effecting a policy of life insurance, a declaration and statement of health, freedom from disease, &c., was signed by the assured. By one clause, "if any untrue averment" was contained therein, or if the facts required to be set forth in the above proposal were not truly stated, the premiums were to be forfeited and the assurance to be void: Held, that as the health, &c. of the party whose life was insured was untruly stated, though not to the knowledge of the party making the declaration and statement, the premiums, &c. were forfeited, and could not be recovered back. *Duckett v. Williams*, H. 1834. 240

### INTERPLEADER ACT.

See SHERIFF.

### IRREGULARITY.

See AFFIDAVIT OF DEBT.—PRACTICE, (*Irregularity—Signing Judgment.*)

### JUDGE AT CHAMBERS.

Though a judge at chambers may

make order for staying proceedings on payment of debt and costs, he cannot order payment by instalments, nor give the defendant more time than he would have had by law. *Kirby v. Elker*, H. 1834. 239

### JUDGE'S ORDER,

For admitting handwriting, &c. to written instruments. v. vi.  
One rule is sufficient to make a judge's order for returning a writ in vacation a rule of Court, pursuant to Reg. Gen. M. 3 W. 4., No. 13, and also to call on a sheriff to show cause why an attachment should not issue against him for disobeying such order. *Kensit v. Bulteel*, M. 1833. 59  
A judge's order granted in vacation must not be drawn up as of the preceding term. *Rex v. Price and Wakelin*, in *Lawrence v. Morgan*, M. 1833. 60

### JUDGMENT.

See PRACTICE, (*Signing Judgment.*)  
Action on. See DEBT.  
On old warrant of attorney. *Ashman v. Bowdler*. 84  
Time for signing on writ of trial. 834

### JUDGMENT AS IN CASE OF NONSUIT.

Where a plaintiff, who had sued a defendant as acceptor of a bill, and got payment from another party, abandoned the action:—Held that the defendant, who disputed his liability as acceptor, was bound to take down the cause by proviso, and could not have judgment as in case of nonsuit, or a peremptory undertaking to try. *Monck v. Bonham*, H. 1834. 312  
When issue is joined in *Trinity term*, and notice of trial given for the

that the landlord might maintain trespass quare clausum fregit for taking possession of the crop, and hindering him from having the use and occupation of the land after the year expired. *Strickland v. Maxwell, Esq., Sheriff of Yorkshire, and another*, H. 1834. 346

Whether the payment of the rent was a condition precedent to the tenant's having the right to the way-going crop, *quære*. S. C. Shewing, in pleading, landlord's title expired. 776  
Holding over. 780

### LEAP-YEAR.

See *Doe v. Harries*, 185.

### LEASES.

See COVENANT.—POWER.

### LEGACY.

Where a testator in his will directs that one class of legacies "shall be paid prior to his debts and other legacies, and that all his legacies shall be paid within two years, *free from legacy duty*," the exemption from duty is not limited to such legacies only as are payable within two years, but the general words "all my legacies," will include a legacy given by a subsequent codicil, which is made payable at a different time. *Byne and another v. Currey and others*, E. 1834. 478

Passing property in. *Best v. Argles*. 256

### LEGACY DUTY.

A will directed executors to lay out the residue of the personalty in the funds, and divide the interest "among poor pious persons, male or female, old or infirm, in 10*l.* or 15*l.*, as they should see fit:" Held, first, that the executors could not be called on to pay le-

gacy duty as beneficial legatees; and secondly, that "poor and pious persons" are not benefited by the bequest as a class, but that each individual selected by the executors was the person so benefited, and was consequently liable to pay the duty when the sum received should exceed 20*l.*, such duty to be then retained by the executor accordingly, after being calculated according to the party's propinquity in blood to the testator. *In re Wilkinson*, T. 1834. 513

### LIBEL.

The declaration stated that defendant had been retained by the plaintiff to edit the plaintiff's newspaper for reward, and that he did not edit it in a proper manner, but without the knowledge, leave, authority, or consent of the plaintiff, falsely, maliciously, and negligently "inserted and published" therein a false and malicious libel &c. It then proceeded to state that an information was afterwards exhibited against plaintiff for "falsely and maliciously printing and publishing" the said libel; and that such proceedings were thereupon had that plaintiff was convicted of the offence and fined 100*l.* The plaintiff had a verdict for the fine and costs. However, judgment was arrested on the ground that upon the declaration the injury sought to be compensated did not appear necessarily consequent on the breach of duty charged against the defendant, for the act of printing and publishing by the plaintiff did not appear to be the same as that of inserting and publishing by the defendant. *Colburn v. Patmore*, T. 1834. 677

*Semle*: The proprietor of a newspaper in which, without his

knowledge or consent, a libel is inserted by his editor, cannot recover against him the damages sustained by his own conviction as proprietor. *S. C.*

A letter written by the defendant and containing a libel, was dated in *Essex*, and addressed to a person in *Scotland*. It was proved to have been in the *Colchester* post-office, and, after being marked there, to have been forwarded to *London* on its way to *Scotland*. It was produced at the trial, with proper post-marks, and with the seal broken, but not by the party to whom it was addressed. Held, sufficient *prima facie* evidence of publication in *Essex*, and that it had reached its address in *Scotland*. *Warren v. Warren*, T. 1834.

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A letter to the manager of a property in *Scotland* in which plaintiff and defendant were jointly interested, relating principally to the property, and the plaintiff's conduct respecting it, but also contained a passage reflecting on his conduct to his mother and aunt:—Held that the latter part could not be privileged as a confidential communication. *S. C.*

### LIEN.

Where a mortgage deed was delivered to a party as evidence of his title to apply for payment of principal and interest due thereon, no lien attaches on the deed in respect of his work and labour in so applying; for the value of the article deposited is not increased by any work done on or with respect to it. *Saunders v. Bell*, H. 1834.

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*S.* contracted with the defendants to execute an extensive building operation for them, in consideration of a certain sum, and of being allowed to use certain mate-

rials. The defendants' engineer was empowered to reject any materials or work not in his opinion conformable to the plans and specifications, and to provide other materials, and employ competent persons to perform the work, if *S.* failed to do so, as well as to deduct the amount from the sum payable to him under the contract. The defendants were at liberty to diminish or add to the works, paying *S.* at the contract prices accordingly, or deducting from them if necessary. *S.* placed on the defendants' premises steam-engines, rail-roads, materials, implements, and other articles of various kinds, necessary to carry on the works. The defendants' engineer visited the premises daily, and rejected such of the materials brought thither by *S.* as he thought unfit for use. During the progress of the works advances were made by the defendants to *S.* on his application; he agreeing that all the engines, materials, &c., brought or to be brought on the defendants' premises for use in constructing the works, should be a security for such advances. Those advances always exceeded the value of the property so on the premises. *S.* became bankrupt before the works were completed, upon which the defendants erased his marks on the engines, materials, implements, &c. then on their premises. *Crowfoot and others, assignees of Streather a bankrupt, v. London Dock Company*, E. 1834.

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In trover brought by the assignees of *S.* against the defendants to recover such engines, materials, &c.: Held, first, that the arbitrator had no power to award that the defendants were entitled to prove against the estate of *S.* for the sum advanced to him by them,

beyond the value of the work done and materials furnished by him, and of the engines, &c. agreed to stand as security. Secondly, That the plaintiffs were not entitled to recover for extra work done by the bankrupt. Thirdly, That as there had been such a possession of the engines, materials, &c. by the defendants as would support the lien, which it was the effect of the bankrupt's agreement to confer on them, the plaintiffs were only entitled to recover for such materials, &c. as were brought on the defendants' premises after the act of bankruptcy. Fourthly, That payments to the bankrupt by the defendants, after the latter portions of materials were brought on the premises, could not be considered as payment for those particular goods in the course of business, but as general advances only, so that they could not be retained by the defendants under 6 G. 4. c. 16. s. 82. S. C.

## LIMITATIONS, STATUTE OF.

See WRIT.

Assumpsit for goods sold and delivered. Plea: statute of limitations. A writ of summons tested within six years from the accruing of the cause of action was put in by plaintiff. It had been twice resealed, and was not served until after the six years had expired. No evidence was given by the defendant when either resealing took place: Held, that the resealing gave effect to the original writ without amounting to a re-issuing of it, and without making it necessary for the plaintiff to prove the date of the resealing or more than the teste of the writ. *Braithwaite, executor of Ullock, v. Lord Montford*, H. 1834. 276

A plea of the statute of Limitations stated that the cause of action did not accrue within six years next before the commencement of the suit. Plaintiff replied, that the cause of action did accrue within the six years, &c.:—Held, that without specially replying process issued, the plaintiff might on the above replication prove a *quo minus* to have issued within the six years, and produce the roll to show the continuances regularly entered up accordingly.

If continuances are regularly entered upon the roll, the court will not look at any thing in order to contradict the roll, *e. g.* a writ produced to show that a second writ, an *alias*, was tested on a day subsequent to the return day of the first. *Dickenson v. Teague*, E. 1834. 480

Effect of statute, as to suing for attorney's bill. See *Harris v. Osbourn*. 445

*W. B.*, by will dated in 1812, bequeathed a legacy of 250*l.* to each of his daughters *Ann* and *Jane*, on their attaining twenty-one, and having appointed two persons executors of his will, and three others trustees, with all necessary powers to fulfil it, died soon after. In April 1823, the trustees became possessed of the sum of 500*l.* retained by them from the surviving executor, as money arising from the estate of *W. B.* to be set apart for the payment of the above legacies, being the only sum remaining in their hands to pay the same. They then advanced this sum to the executor, and the defendant (as his surety) on the security of a joint and several promissory note signed by them, and payable with interest to "the trustees acting under the will of *W. B.* or their order, upon demand." The legacies not being

yet payable, it was next agreed verbally, that while the legatees lived with the executor, no interest should be payable on the note. In August 1828, the executor paid *Ann*, who had previously attained 21, her legacy of 250*l.* with interest for such time as she had ceased to live with him. The surviving trustee of *W. B.* sued the defendant on the note in 1832. Held, that he was entitled to recover thereon for the legacy payable to *Jane*, who had come of age in the interim, the part payment by the executor to *Ann* having taken the case out of the statutes of limitations, 21 *Jac.* 1. c. 16., and 9 *Geo.* 4. c. 14. *Meggison v. Harper*, M. 1833.

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In order to take a case out of the statute of limitations, a letter from defendant to plaintiff was put in, in which were the following words: "I shall be most happy to pay you both interest and principal as soon as convenient," and in a subsequent part "I shall pay no more interest till we have a fair settling." Other letters of the defendant acknowledged a debt, but spoke of a settling between him and the plaintiff.

Held, that in order to enable the plaintiff to recover, some evidence must be given that a time had arrived when it was convenient to the defendant to pay, and *semble* also that the settlement alluded to had taken place between the parties. *Edmunds v. Donnes*, H. 1834.

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Whether the date of an acknowledgment of debt made in writing pursuant to 9 *G.* 4. c. 14. s. 1. can be proved by extrinsic oral evidence, *quære.* S. C.

Though a debt from defendant to plaintiff, larger in amount than a subsequent payment, is proved to

have existed at a time previous to such payment, and no other account appears to have existed between them; the mere fact of the payment of a sum by defendant to plaintiff is not enough to take a case out of the statute of limitations without some evidence to satisfy a jury; first, that it was a payment of a debt, and next, that it was not the discharge of a balance due, but a payment intended to be applied to the part discharge of the particular debt.

A defendant is not entitled to a rule to enter a nonsuit on a point taken at the trial and afterwards approved by the court, unless the judge *ad nisi prius* gives him leave so to move; but can only have a rule for a new trial. *Tippett v. Heane*, T. 1834.

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The statute of limitations in assumpsit begins to run from the time when the cause of action accrues. Therefore where by a local turnpike act the trustees were to pay first the expenses of obtaining the act, and next, the expenses of erecting toll-houses &c., a builder who brought an action for work and labour in so doing, more than six years after the work done, but within six years of the time when the trustees had funds in hand, by having paid off the expenses of the act, it was held that he was too late, as the action was maintainable after the work done though the execution would have been postponed. *Emery, surviving partner of Rich deceased, v. Day*, T. 1834.

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Where a local turnpike act provided that all orders of the trustees should be entered in a book kept for that purpose, an order by them to pay a bill is not an act done so as to take a debt out of the statute of limitations, under 9 *G.* 4. c. 14., unless it is so entered

in writing; the only act capable of taking the case out of the statute being the payment of principal or interest. *S. C.*

A clerk to turnpike trustees is not personally liable under a clause by which they may sue and be sued in his name. *S. C.*

In assumpsit for goods sold and delivered, the general issue and a plea of the statute of limitations were pleaded. The plaintiff's replication traversed the latter plea. His evidence consisted of such an admission by the defendant as would have been evidence to go to a jury on the general issue, that a debt was owing from him to the plaintiff; but he did not prove when the debt was contracted. No evidence was given for the defendant in support of his plea. Held, that it was incumbent on the plaintiff to support the affirmative terms of his replication, by showing that the debt was contracted within six years, or that the acknowledgment or promise was made in some writing signed by the defendant, so as to take the case out of the statute, pursuant to 9 G. 4. c. 14;—and a nonsuit was entered accordingly. *Wilby v. Henman*, E. 1834. 957

#### LIQUIDATED DAMAGES, 566

##### LONDON, CITY OF.

The charters of the city of London vest in that body, fines for misdemeanors committed within the city, though imposed or adjudged by the court of King's Bench, sitting in banc at Westminster, after a trial at the sittings at Guildhall. *The King v. The Mayor and Inhabitants of the city of London*, In the matter of the fine set on Mozely Woolf, T. 1834. 709

See COURTS OF REQUESTS.

#### LORDS' ACT.

See INSOLVENT ACT.

#### MALICIOUS PROSECUTION.

In an action against a party for maliciously and without probable cause informing against the plaintiff for an offence, it is a sufficient answer to say that the plaintiff having been convicted of trespassing on land in pursuit of game, in the day-time, under 1 & 2 W. 4. c. 32., underwent the sentence of imprisonment according to that conviction, without appealing against it within the time and in the manner pointed out by section 44 of that act. *Mellor v. Baddeley and another*, E. 1834. 962

#### MEMORANDA, 380. 382

##### MESNE PROFITS.

A plaintiff recovered in ejectment on a demise laid on 5 June. In the action for mesne profits, the occupation being proved from that day, the defendant showed that a sum being due on 24 June for ground-rent, was paid by him:—Held, that he might deduct that sum from the damages recovered for the mesne profits, and that the plaintiff could only recover the costs taxed between party and party. *Doe v. Hare*, M. 1833. 29

##### MISNOMER.

See BAIL-BOND.

#### MONEY HAD AND RECEIVED.

In 1810 the defendant's wife died seised of certain freehold, with which was intermixed certain copyhold, to which she had been admitted in 1804. She left surviving her the defendant, and an only daughter, who was shortly after admitted to the copyhold and

married in 1815. The defendant remained in possession of the freehold ever since as tenant by the curtesy; and also of the copyhold ever since, letting them both from time to time together at an entire rent, and never recognizing any right in his daughter or her husband to either copyhold or rent. No title was proved except from the court rolls of the manor. It was insisted that the defendant's possession must be taken to have continued for the protection of his daughter's right, and that he was therefore her agent for receipt of the rent of the copyhold, liable to an action by her husband to recover it, as money had and received to his use. Held, that the husband could not maintain that action against the defendant without proving such an agency, or some recognition by him of his daughter's right, so as to establish a privity between the plaintiff and defendant, and avoid the question of title, which would otherwise have arisen. *Clarence v. Marshall, clerk*, H. 1834. 148

*Semble*, the husband might sue alone. *S. C.*

The agent for the owner of a ship produced to the captain an account, which after debiting him with various sums received to the use of the owner, and crediting him for various payments on account of the ship, showed a balance against him. To that account the captain assented and signed it. The agent then produced another account of the captain's claim on the owner for wages, to which, as there stated, the captain refused assent. The first account was the only evidence of money had and received by him to the owner's use. In an action against him by the owner, both accounts were produced. Held,

that the admission by the defendant on the first account of sums received to the plaintiff's use, conclusively proved the plaintiff to be entitled to recover on the count for money had and received; though *semble* under the circumstances, it was not evidence on the account stated. *Lorymer v. Stephens*, T. 1834. 869

## NEWSPAPER.

See LIBEL.

## NEW TRIAL.

See PENAL ACTION.

## NONSUIT.

Leave necessary for moving to enter. 772

## NOTICE, SHORT, OF TRIAL.

See TRIAL.

## OCCUPATION.

See DEMISE.—MESNE PROFITS.

An undertenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is *quasi* tenant at sufferance; and the mere fact of occupation, coupled with the payment of rent for such time of occupation, does not raise the presumption of a demise for years, unless there is some evidence to show an agreement for a demise for a term. *Simpkin v. Ashurst Gent. one &c.*, T. 1834. 780

## PARTIES TO ACTION.

See SHIP.

## PARTNERS.

See INSOLVENT.—SHIP.

Mere knowledge by a creditor of the dissolution of partnership, will not release the old partners from their

liability to him, though he continue his account with the new firm, unless he appears expressly, or by some act, to have accepted the substituted credit of the new partnership instead of the retiring partners. *C. M. and N., trading under the name of J. K. and Sons, were indebted to A.:—C. retired from the partnership, and M. and N. undertook to liquidate the concerns. Afterwards N. went out of the business, and on his retirement a new partner was taken in. At that time a notice of the previous dissolution of partnership was advertised in the Gazette, but there was no proof that the plaintiff ever saw that advertisement. No notice was given of the introduction of the new partner; the business was carried on in the old style of J. K. and Sons, and the plaintiff continued his account with them under that name. About eleven months after the dissolution, in a letter to one of the partners who had retired, plaintiff said he was aware that after the dissolution he had no claim against him, "but there was nothing to show that he accepted the substituted credit of the new partner in his stead."* Held, that the three original partners to whom the loan was made were not released from their liability. *Jane Kirman, Administratrix of Antony Kirwan, v. Clement Kirwan, Matthew Kirwan, and Nicholas Tuite Kirwan, E. 1834.* 491

A solvent partner may sue out a writ in the name of his copartner, or, if bankrupt, in the names of his assignees, as well as his own, in order to recover a debt due to the partnership. *Whitehead suing with Dorning and others, assignees of Greenwood, a Bankrupt, v. Hughes and another, M. 1833.* 92

The plaintiff and defendant had

worked a coal-pit in partnership till it was exhausted, when plaintiff said he would join in no more coal-pits, and defendant said he should work another whether plaintiff joined him or not. The materials and utensils belonging to the mine were valued, and each party was to take an article by turns, according to that valuation, till the whole was divided. The valuation was made, and it was subsequently agreed that the defendant should take the whole at the valuation, and he took possession of them. *Jackson v. Stopherd, H. 1834.* 330

The other partnership debts and credits remained unsettled: Held, that this was a transaction, so separate and distinct from the general accounts, that the plaintiff might sue for his moiety of the value of the materials and utensils before the final settlement of the partnership accounts. *S. C.*

A valuation made for the information of parties, and not binding on them, is not made liable to an appraisement stamp, by 55 G. 3. c. 184. Sched. Part. I. tit. *Appraisement*, though an agreement is afterwards founded on it. *S. C. Ibid.*

### PAYMENT

To apprentice in his master's counting-house will bind the master if made in the usual course of mercantile business, and in discharge of a commercial debt; but such a payment of money, if made to him on another account, as *e. g.* by a stakeholder of a sum to be deposited with him, will not. *Saunders v. Bell, H. 1834.* 244

Plea of, see ACCOUNT STATED.

### PAYMENT INTO COURT.

Payment of money into Court on a declaration in assumpsit containing

Where the first count of a declaration was against the defendant as acceptor of a bill of exchange, stating a promise to pay the bill without any breach, and was followed by a count for money lent, money paid, &c. with a promise to pay limited to the latter sums, the breach is good if it goes on to state that he has disregarded his promise, and hath not paid the said monies to the plaintiff. *Turner v. Denman*, H. 1834. 313

Where by any statute made before 3 & 4 Will. 4. c. 42. a defendant had a right to give special matter in evidence under the general issue, that right is reserved to him by section 1. of the last-mentioned act; but since Reg. Gen. Hil. 4 Will. 4., he cannot plead the general issue, and also a special plea of justification. *Neale v. Mackenzie*, T. 1834. 670

Where a declaration alleged the defendant to be indebted to the plaintiff in a certain sum for work and labour, without laying any promise to pay it, and then under a 'whereas also,' proceeded to state him to be indebted to plaintiff in several other sums for goods sold and delivered, &c. concluding that the defendant had promised to pay the said last-mentioned several monies respectively to the plaintiff on request:—Held bad on demurrer for want of promise in the first count, which was not referred to by the word "last-mentioned" in the second count. *Harding v. Hibel*, H. 1834. 314

In debt on a bail-bond, it is not a sufficient defence to plead that no affidavit of debt was filed in the action against the principal, pursuant to 12 Geo. 1. c. 29. s. 2. *Knowles, Assignee of Wilson and Harmer, Sheriffs of London, v. Stevens*, E. 1834. 1016

*Semble*, that to raise the ques-

tion on that act, whether the entire absence of such an affidavit is a defence to an action on a bail-bond, it should be pleaded that no such affidavit was made. The plea must conclude with a verification or to the country. *S. C.*

### *Regulæ Generales.*

As to pleading, *Hil. T. 4 W. 4.* vii.—xvi.

In scire facias on a recognizance of bail, the plaintiff stated by way of memorandum, at the head of the matter intended to be a declaration, that he brought in *his bill* in a plea of debt on a recognizance, the tenor of which *bill* follows in these words, to wit: '*Middlesex*, to wit. Be it remembered &c.' stating the two writs of sci. fa., the first of which recited the judgment against the party bailed. Plea, no ca. sa. against the principal. Replication set forth ca. sa., and stated to be directed to and returned by the sheriffs of London. Rejoinder, that the original action was brought and the venue laid in *Middlesex*, and not in *London*. Surrejoinder raised an issue that the original action was brought, and the venue therein laid in *London*, concluding with a verification. Special demurrer thereto, assigning for cause that it should have concluded to the country: Held, that the surrejoinder was good, as it did not necessarily follow that the action must be said to be brought in the county where the venue was originally laid, for by change of venue the proceedings in the action may have been elsewhere; and 2dly, that the commencement of the declaration improperly stated that a bill was brought in &c. might be rejected as surplusage, after pleading over to it, as the objection had not been taken on special demurrer to the

terest in land, viz. for rent in arrears, is bad on general demurrer.

If a plea allege that the plaintiff held as tenant to the defendant under a demise, and the plaintiff replies generally, the law presumes that the reversion is in the landlord, and that therefore he has a right to distrain. Any question as to the landlord's reversion should be raised on a special replication. *Hooker v. Nye and another*, T. 1834. 776

By executors. *Jones v. Roberts*. 48  
In slander. See SLANDER.

On bills, &c. See BILLS AND NOTES.

Construction of the terms "supposed," "alleged," and "if any." *Gould v. Lasbury*, T. 1834. 863

## PLENE ADMINISTRAVIT.

See EXECUTORS.

## PLURIES.

See WRIT.

## POLICY OF INSURANCE.

A ship's policy of assurance contained a memorandum in the margin, that the said ship was "warranted not to sail for *British North America* after 15th August, 1831." On that day she was in dock at *Dublin* ready for sea, and having cleared for *Quebec*, was hauled out of dock into the *Liffey* as early in the afternoon as the tide permitted. The wind blowing strong and directly up the river, she could not set a sail, but was warped down about half a mile, when the tide falling she took the ground. The master knew at the time of leaving the dock that the ship could not get to sea that day. She was warped a little further next day, took the ground again when the tide fell, being still ten miles from the harbour's mouth. On the 17th, the wind having changed, she set her sails

and got to sea. *Cochran, Administratrix, v. Fisher*, E. 1834. 424

Held, that if at the time of breaking ground in the harbour, and going down the river on the 15th, the captain acted bonâ fide with intent to put himself in a more favourable position to proceed on his voyage, the warranty was satisfied, even though he had also intended to comply with its terms; but that if he so moved the ship not in order to get a better position, but with the sole object of keeping within the letter of the warranty, it had not been complied with. This alternative not having been put to the jury, a new trial was ordered. *S. C.*

## POOR-RATE.

An increased poor-rate having been assessed on certain premises, an appeal against it was entered at the next sessions and there respited, but no notice in writing of that appeal was given to the overseers under 41 G. 3. (U. K.) c. 23. s. 2. Before the hearing of the appeal the overseers distrained for the increased rate; the amount was paid under protest, and possession of the distress was thereupon relinquished. The rate was afterwards reduced by order of sessions, in consequence of a decision of the King's Bench. An action having been brought by the ratepayers against a person who was overseer at the time of the distress, to recover the surplus as for so much money had and received by him to their use: Held, that no notice of appeal having been given to the overseers, pursuant to the statute, the action would not lie. *Priestley v. Watson*, E. 1834. 916

## POSSESSION.

Keeping, for daughter. See *Clarence v. Marshall*. 147

## POST OFFICE.

See LABEL.

## POWER.

By a leasing power in a marriage settlement, dated 5th *August*, 1777, power was reserved to the persons in actual possession, by virtue of its limitations, to lease any part of the lands thereby settled in strict settlement "for one, two, or three life or lives, or any term or number of years not exceeding twenty-one, so as upon all and every such lease or leases there should be reserved and continued payable, during the respective continuance of such lease and leases, by half-yearly payments, the best and most improved yearly rents that could be reasonably had or obtained, without taking any sum or sums of money or other thing by way of fine or income for the same." By lease of 11th *January*, 1783, the tenant for life of the settled property (one of the creators of the power) demised a part of it to hold from the 4th *January* preceding for three lives, *reddendum* the yearly rent or sum of 31*l.* 10*s.*, at or upon the two most usual feasts or days of payment in the year, viz. the feast of *St. Philip and St. James the Apostles* (1st *May*), and *St. Michael the Archangel* (29th *September*), by even and equal portions; the first payment to be made on the feast of *St. Philip and St. James the Apostles*, next ensuing the date of the lease: Held, first, that the lease was void, the power not having been duly executed by reserving the rent at half-yearly periods; — secondly, that old leases of other lands in the neighbourhood were not admissible to show the above feast days to be the usual half-yearly days of payment in that country.

*Doe on demises of Harries & others, v. Morse*, H. 1834. 185

## PRACTICE

Of court distinguished from course directed by statute 2 *W. 4. c. 39.* 994

(Attorney.)

The construction of Reg. Gen. M. 1 *W. 4. No. 8.* (ante, Vol. I. p. 160,) is, that an attorney residing out of *London, Westminster, or Southwark*, but within ten miles, must enter in the book at the office of the clerk of the pleas, some proper place, within one mile of that office, where notices &c. may be served. *Blackburn v. Peat*, M. 1833. 38

Pleadings are within that rule. S. C.

(Capias.)

If a *capias* does not state the residence of the defendant, pursuant to 2 *Will. 4. c. 39. Sched. No. 4.* it will be set aside for irregularity, with all subsequent proceedings, notwithstanding Reg. Gen. Mich. 3 *Will. 4. No. 10.* *Price v. Huxley*, M. 1833. 68

(Cognovit.)

The directions of Reg. Gen. Hil. 2 *W. 4. No. 72.* should be strictly complied with. Therefore when a *cognovit* or warrant of attorney is executed by a defendant who is in custody on meane process, the attendance of an attorney who has been requested to attest the execution by the clerk to the defendant's attorney, will not suffice, though the defendant make no objection at the time; for he is not named by nor does he attend at the defendant's request. *Fisher v. Papanicolas*, M. 1833. 44

*Semble*, that the attorney for the defendant who subscribes his name

as a witness to the execution of the *cognovit*, should in writing thereon declare himself to be attorney for the defendant, and that he subscribes as such pursuant to the rule. *S. C.*

(Direction of Writ of Summons.)

Directed to the sheriffs of *Middlesex* is bad, and will be set aside with costs. *Barker v. Weedon*, T. 1834.

860

See *VARIANCE*.

(Indorsement on Writ of Summons.)

A stack of hay standing on the defendant's premises was sold by him to the plaintiff, who was to take it away by a fixed day. Before the time arrived, the defendant's landlord distrained it for rent: Held, that the amount of debt and costs need not be indorsed on the writ of summons, as the cause of action was partly for the loss of the right to keep the hay on the ground. *Perry v. Patchett*, T. 1834.

725

(Amending Writ of Summons.)

No amendment of a writ of summons will be permitted except in a case where the plaintiff's demand would otherwise be barred by the statute of limitations. *Lakin and two others, Executors of Watson, v. Massie*, T. 1834.

837

(Making up Issue.)

The declaration was delivered in *Michaelmas* vacation, as of *Michaelmas* term; and the plea, entitled on 11th *January*, was delivered as of that day (being the first day of *Hilary* term). The issue was made up and delivered as of *Michaelmas* term. The Court refused a motion to set it aside, for not being made up of *Hilary* term; as the plea might have been delivered before the sitting of the Court on 11th *January*, and no damages appeared

from the issue being entered of *Michaelmas*. *Dickenson v. Reynolds*, H. 1834.

374

(Notice of Inquiry.)

Notice of inquiry may be stuck up in the office of pleas, and a copy left at defendant's last place of residence, by leave of the Court, where the defendant had never been found to be served with the previous proceedings, and the persons resident at her last place of residence refused to say where she now resides. *Watson v. Delcroix, Executrix*, H. 1834.

266

(Personal Service.)

See *WRIT*.

(Plaintiff suing in Person.)

If a plaintiff living in a place not "within any city, town, parish, or hamlet," (*e. g.* *Gray's Inn*.) and suing in person, describe himself as of the extra-parochial place, it is sufficient under the uniformity of process act, 2 *Will.* 4. c. 39. s. 12. *King v. Monkhouse*, H. 1834.

234

(Rejoining gratis and Joinder in Demurrer.)

A defendant being under terms to "rejoin gratis," need not join in demurrer within twenty-four hours after demand of joinder in demurrer. *Jones v. Key*, H. 1834.

238

(Rule to compute.)

If several defendants, sued on their joint promissory note, suffer judgment by default, it is sufficient to serve one with the rule to compute. *Figgins v. Ward and two others*, H. 1834.

282

(Security for Costs.)

Security for costs will not be required where the plaintiff, being in indigent circumstances, sues qui

Gen. Hil. 4 W. 4. No. 2. *Cresswell v. Crisp*, E. 1834. 991

### PRIVILEGE.

See AMBASSADOR.

In an action on the case against a party for causing the arrest of a person privileged from arrest (*e. g.* a witness attending on his subpoena, or a practising attorney,) thereby putting him to the expense of finding bail and procuring his discharge by order of a judge, the plaintiff must show that his imprisonment at the particular time in question took place by some act of the defendant, and that he knew or recognized the circumstances accompanying it, and also knew that the party arrested was privileged at that time. *Stokes v. White, gent., Side Clerk, &c.* T. 1834. 785

Whether such an action is maintainable, *quære.* S. C.

The offices of the sworn and side clerks of the Exchequer are not abolished by stats. 1 Will. 4. c. 70. or 2 & 3 Will. 4. c. 110; but as the sworn clerks are thereby disqualified from acting as practitioners, the side clerks can no longer sue in their names, though they may still practise there as attorneys without being admitted as such. S. C.

### PROBATE DUTY.

*M. S.* by will bequeathed certain stock in the funds to trustees to stand possessed thereof on such trusts and for such purposes, and subject to such powers and declarations, as *J. S.* by deed, with or without power of revocation and new appointment or by will should appoint; and in default of appointment, in trust to pay *J. S.* the dividends for life, and after her decease to divide the principal

among her children then living. After the testator's death, *J. S.* duly executed a deed according to the form prescribed by the will, by which deed, after reciting her desire to execute the power vested in her by the will of *M. S.*, she directed the trustees to transfer the fund to herself and a new trustee, upon such trusts, for such purposes, and subject to such powers &c., as she should by any deed, with or without power of revocation and new appointment, or by her last will, direct and appoint; with certain limitations over in default of appointment, similar to those contained in the will. Under this deed the stock was transferred into her own name and that of her co-trustee. Afterwards *J. S.*, by will made by virtue and in execution of the last-mentioned power reserved to her by that deed, and of all other powers, appointed the stock to be transferred to certain persons, in trust that it might be consolidated with and become part of her residuary personal estate, and follow the dispositions thereof thereafter contained: Held, that the deed executed by *J. S.* being an exercise of the power given her by the original will, the property became her personal estate in which she had a beneficial interest, and was as such liable to her debts, and therefore that it was liable to the payment of probate duty under 55 Geo. 3. c. 184. s. 38. *Attorney-General v. Staff and another*, M. 1833. 14

Probate duty is not payable under 55 Geo. 3. c. 184. in respect of personal assets of an *English* testator domiciled and dying in *England*, which being locally situate in a foreign country at the time of his death were not brought hither till after that event by his executors, though they had obtained

serve on board the ship *Royalist*, "bound from the port of *London* to the *South Seas* to procure a cargo of sperm oil, and to return therewith to the port of *London*, where the voyage was to end." Instead of wages he was to receive a certain share of the net proceeds of the cargo; and it was stipulated that no one of the crew should "demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel at *London*, and her cargo should be there sold and delivered, and the money for the same actually received by the owner. *Jesse, Administrator of Jesse, deceased, v. Roy and another, Executors of Smith*, T. 1834. 626

A cargo was procured, the ship was afterwards condemned in a foreign port, and the mariner accompanied part of the cargo on its homeward voyage (it having been shipped into another vessel, the *Alexander*,) but died at sea. Held, that "until" in the above articles is a word of limitation of the mariner's right to wages, and not of postponement of payment of them merely; and consequently that as the ship did not return to *London*, the administrator of the mariner was not entitled to recover his 95th share of the net proceeds of the *Royalist's* cargo, but only to recover a quantum meruit for his services on board the *Alexander*. S. C.

## SECURITY FOR COSTS.

See PRACTICE, (*Security for Costs*.)

## SERJEANT-AT-MACE. 700

See ESCAPE.

## SERVANT.

See WARRANTY.

## SERVICE.

Of copy of process under practice of court. 994

## SET-OFF.

Where any plea is pleaded besides the general issue, a notice of set-off will not enable the defendant to give in evidence the matters of his set-off under 2 *Geo. 2. c. 22. s. 13*, without pleading it. *Duncan v. Grant*, T. 1834. 816  
But see now R. G. H. 4 W. 4, PLEADINGS, &c., No. I. Reg. 3. this Vol. p. xv.

Plea of. See ACCOUNT STATED.

## SHERIFF.

See ESCAPE.—WRIT OF TRIAL.

Sending notes of trial. See TRIAL, WRIT OF.

Discharging defendant in execution. 907. 910

The Court will not interfere under the interpleader act 1 & 2 W. 4. c. 56. s. 6. in favour of a sheriff who has seized goods under a fi. fa., unless an actual claim of the property in question appears to have been made before moving for the rule. *Beniley v. Hook*, H. 1834. 229

*Scumble*, in an issue directed under the act, the claimant should be the plaintiff and the execution creditor the defendant. S. C.

Where on a rule obtained by a sheriff under the adverse claim act 1 & 2 Will. 4. c. 58. the claimant did not appear, the Court discharged the rule as regarded the plaintiff in the cause, and barred the claim of the claimant, and called on him and the defendant to show cause why they or one of them should not pay the plaintiff and the sheriff their respective costs occasioned by the rule. *Lewis v. Eicke*, H. 1834. 158

The declarations of a sheriff's officer

damages, and on the other nine for 100%. Entire costs were taxed to him on the whole. A court of error afterwards held the sixth count bad, and that a venire de novo should be awarded as to the nine counts. The plaintiff, however, having consented to remit his damages on the nine counts instead of a venire de novo, that court directed the verdict to stand on the seventh count on those terms:—Held, that the master ought to disallow the plaintiff the costs taxed to him on the other nine counts. *Dadd v. Crease*, M. 1833. 74

A declaration for slander stated by way of inducement, that plaintiff was a pork-butcher, and then charged the defendant with publishing to plaintiff, in presence of other persons, these words of and concerning the plaintiff:—"You are a bloody thief—who stole F.'s pigs? You did, you bloody thief, and I can prove it. You poisoned them with mustard and brimstone;" inuendo, that plaintiff was guilty of pig-stealing. The jury found that the words were not intended to impute felony, but were spoken of plaintiff in relation to his trade:—Held, that the plaintiff was not entitled to recover, as the words used did not show that they were necessarily spoken of him in relation to his trade, and no colloquium concerning his trade was laid in the declaration. *Sibley v. Tomlins*, M. 1833. 90

The agent of a landlord employed the plaintiff to do work at the house of the defendant, who was a tenant on the estate. The plaintiff did it improperly, and got drunk during the time he was engaged in it. Several circumstances took place which induced the defendant to believe the plaintiff had broken open his cellar-door and

got access to his cyder. Two days after, the defendant saw the plaintiff in company of T., a fellow-workman, and charged him with having broken his cellar-door, got drunk, and spoiled the work. The defendant afterwards repeated the charge to T. in the plaintiff's absence; and on the same day complained to the agent that the plaintiff had spoiled his work and had got drunk, that his cellar-door had been broken open, as he believed, by the plaintiff:—Held, first, that the complaint to the agent, if bona fide made, and without malicious intention to injure the plaintiff, was a privileged communication.

Secondly, that the uttering the words to the plaintiff, though in the presence of T., was similarly privileged, if done honestly; for that the circumstances of its being made in the presence of T. did not of itself make it unwarranted and officious, though that circumstance with others, *e. g.* the style and character of the language used, might be left to the jury to determine whether the defendant acted bona fide in making the charge, or was influenced by malicious motives in seeking an opportunity to make it before a third person.

Thirdly, that the statement to T. in the plaintiff's absence was unauthorized and officious, and therefore not protected, though made in the belief of its truth, if it turned out to be in point of fact false; and that it should be left to the jury whether defendant acted maliciously or not on that occasion. *Toogood v. Spryng*, T. 1834. 582

## SPECIAL CASE.

See PRACTICE, (*Special Cases*.)

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| 7 & 8 G. 4. c. 17. s. 1.             | 1017                |
| 9 G. 4. c. 14.                       | 94. 173.            |
| —                                    | 695. 931. 958       |
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| — c. 27. s. 13.                      | 824                 |
| 11 G. 4. & 1 W. 4. c. 68;            | 134                 |
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| 1 W. 4. c. 7.                        | 837                 |
| — c. 68. s. 2 & 3                    | 184                 |
| 1 & 2 W. 4. c. 32. s. 30.            | 44. 964             |
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| 2 W. 4. c. 39.                       | 4. 68. 170. 266.    |
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| 3 W. 4. c. 39. s. 3.                 | 374                 |
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| 3 & 4 W. 4. c. 48. s. 18. | 369      |
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| — s. 17.                  | 64. 270. |
| —                         | 833. 834 |
| — s. 23.                  | 271. 670 |

## STAYING PROCEEDINGS.

See JUDGE AT CHAMBERS.

If a defendant is misled by the plaintiff's indorsing on the writ a larger sum than is due, and appears in consequence, instead of paying the sum really owing, with the costs of the writ in eight days, as he would otherwise have done, the court or a judge will stay the proceedings on a like payment, if he applies promptly after service of a declaration accompanied with particulars claiming the sum really due. *Ellison v. Roberts*, H. 1834. 214

## SUBPENA DUCES TECUM.

See *Summers v. Mosely*, 159.—  
WITNESS.

## SUBPENA SOLVAS.

See Costs.

## SUPERSEDEAS.

See Error.

## SURGEON.

Where a surgeon attended patients in cases requiring surgical aid, and also dispensed medicines to them, not being certificated as an apothecary under 55 G. 3. c. 194:—Held, that he might recover for his surgical advice. *Scoble*, that a surgeon may dispense medicines to his patient in a case which he attends requiring surgical aid. *Simpson v. Ralfe*, H. 1834. 325

## SURRENDER.

A. let premises, consisting of a stable and cottages, to B. for seven

years. *B.*, before the expiration of the term, assigned the premises to *C.* and paid his rent up to that day, which was in the middle of a half-year. *C.* occupied part of the premises, and on leaving them, not at the end of a half year, paid rent for the time to *A.*'s agent. *A.* was not at that time aware either of the assignment or the occupation by *C.* Afterwards, but still before the expiration of the term, *A.*'s agent advertised the premises to be sold, and no sale taking place, let two of the cottages to fresh tenants, in order, as he said, to relieve some tenants who had run away. The agent afterwards received portions of the entire rent from the tenants, and the rest from *C.* the assignee of *B.* :—Held, that these facts, taken collectively, amount to a surrender of the term by operation of law.

*Semble*, when a number of facts, which singly may be ambiguous, amount collectively to an unequivocal proof of a fact, *e. g.* the surrender of a term, a judge is not bound to submit them formally to a jury, unless the counsel expressly desires it. *Reeve v. Bird*, T. 1834. 612

#### TENDER.

See **BILLS AND NOTES.**

#### TENANT AT SUFFERANCE,

780

TIME, See 838.

#### TITHES.

Unless a tithe owner has a right of way to carry tithe off titheable lands within his parish, by grant of the owner of the fee or by prescription, he has *prima facie* only a right to use such road for that

purpose as is used at the time by the occupier to carry off the other nine-tenths; and if he has any further right to use any other way from the particular close, because used by the occupier for other agricultural purposes, or for more convenient use of the close, though not for the purpose of carrying off the crop, that right can only exist while such way continues without being stopped up by the occupier. *James, clerk, v. Dods, M.* 1833. 101

#### TRESPASS

On land in day-time, under 1 & 2 W. 4. c. 32. See *Mellor v. Baddeley and another*, E. 1834. 962

#### TRIAL, LOSING.

See **BAIL.**

#### TRIAL.

(*Notice of.*)

A defendant who is bound to take short notice of trial, is not bound to take short notice of executing a writ of inquiry. When a defendant is entitled to fourteen days' notice of inquiry, and receives an eight days' notice only, he should return it immediately, in order to prevent expense; and where he did not do so, and let six days out of the eight elapse before he gave notice of motion to set aside the proceedings for irregularity generally, without pointing out what it was, the inquiry was set aside, but without costs. *Stephens v. Pell*, H. 1834. 267

#### TRIAL, WRIT OF.

Time for signing judgment on. 834  
A bond in the penal sum of 200*l.* was declared on as if the penalty had been 260*l.* :—Held, that the mistake might be amended under

3 & 4 W. 4. c. 42. s. 23., and *semble*, by the sheriff trying an issue under a writ of trial. *Hill v. Salt*, H. 1834. 271

A motion for a new trial of an issue tried by a sheriff or other inferior judge, under 3 & 4 W. 4. c. 42. s. 17., should be made on producing a copy of the sheriff's notes, verified by affidavit, or if the rule is granted, it will be discharged. *Johnson v. Wells*, H. 1884. 270

A sheriff or other judge presiding at the trial of an issue under a writ of trial, pursuant to 3 & 4 W. 4. c. 42. s. 17., has the same power to nonsuit that a judge at nisi prius has.

An action for unliquidated damages, *e. g.* in running down the defendant's boat, cannot be tried before the sheriff under a writ of trial. *Watson v. Abbott*, M. 1833. 64

*Semble*, that if on a writ of trial issued pursuant to 3 & 4 W. 4. c. 42. s. 17., a verdict was given for 20*l.*, and for a sum of 10*s.* for interest, a judgment entered up for both sums would be irregular. *Burleigh v. Kingdom*, H. 1834. 369

On 23d May the plaintiff had a verdict in a cause tried before a sheriff on a writ of trial issued under 3 & 4 W. 4. c. 42. s. 17. He did not sign judgment till the 27th, after taxing costs on that day:—Held, that the judgment was signed regularly and in time within the term "*forthwith*" in s. 18. *Nicholls and another v. Chambers*, T. 1834. 834

If a sheriff before whom a trial takes place under 3 & 4 W. 4. c. 42. s. 17., does not, after promising to do so, send his notes of the trial within the time proper for moving for a new trial, the court will enlarge

the time for moving, and permit the facts proved at the trial to be laid before it on affidavits. *Thomas v. Edwards*, T. 1834. 859

Motions for new trials after writs of trial, under 3 & 4 W. 4. c. 42. s. 17. should be made on an affidavit verifying the notes of the presiding judge annexed thereto, to be his notes, without further affidavits. *Grange v. Shoppee*, E. 1834. 1000  
The affidavit verifying the sheriff's notes of a trial had under a writ of trial, pursuant to 3 & 4 W. 4. c. 42. s. 17. need only state that the paper annexed contains the notes sent by the sheriff to the court. *Hellings v. Stevens*, E. 1834. 1001

## TROVER.

A quantity of hops was purchased from the defendants in April 1831, the invoice of which contained the words "*on rent*." The hops remained in the seller's warehouse, and a bill accepted by the buyer was afterwards given them at their request, which they indorsed on getting it discounted. During the running of that bill, part of the hops was delivered, in pursuance of the buyer's order to his sub-purchaser, who paid the warehouse rent charged by the sellers. Afterwards, and before the bill became due, the original buyer became bankrupt, and it was dishonored at maturity. Held, that though the sellers might not have a right, while the bill remained outstanding, to part with the hops remaining in their possession, the assignee of the original buyer could not maintain trover for them without actual payment of the price agreed on, as well as of the warehouse rent, he having only the right of property, without that

## VARIANCE.

See BAIL BOND.

**Between writ and declaration.***Knowles v. Stevens.* 1016

**Writ in trespass indorsed in debt and declaration in assumpsit.** Writ and declaration were both set aside for variance; though the objection to the writ itself had not been previously taken. *Edwards v. Dignam*, H. 1834. 213

**The writ of summons was against Andrews Bryan** "in an action on promises," and the defendant's name was similarly spelt in the distringas; but in the copy of the writ served on defendant the name of Andrews was stated to be Andrew:—Held that the distringas must stand, for the service of the copy was not made in pursuance of 2 W. 4. c. 39., but according to the practice of the court. *Pybus v. Bryant*, E. 1834. 994

(*Between Distringas and Writ of Summons.*)

**A distringas in a plea of trespass on the case on promises will not be set aside, though the writ of summons was "in an action on promises."** S. C.

## VENDITIONI EXPONAS.

See SHERIFF.

## VENDOR AND PURCHASER.

**By the conditions of sale of leasehold premises, the vendors stipulated that they should deliver an abstract of the lease and of the subsequent title under which the leasehold lots were held, but should not be obliged to produce the lessor's title. The defendant became the purchaser, and on investigating the title for himself, it appeared to be defective, and he**

**refused to complete the purchase:** Held, that the purchaser was not concluded from inquiring aliunde into the lessor's title; by the stipulation that the vendors should not be obliged to produce it. *Shepherd and others, assignees of Plummer, v. Keatley*, T. 1834. 571

## VENUE.

**An affidavit of a good defence on the merits is not necessary in order to changing the venue on special grounds, where the facts sworn to amount to a good defence, e. g. where it is sworn that the debt has been satisfied.** *Johnson v. Beresford*, M. 1833. 57

**The venue having been changed from London to Hereford in an action of covenant on a lease for non-payment of rent for premises situate in Hereford, the court refused to bring it back.** *Arden v. Mornington*, M. 1833. 56

**In an action for breaches of covenants in a lease to manure, repair, &c., the venue will not be changed on the ground that it will be necessary to call witnesses for the defence who live in the county to which it is sought to remove the cause, and that a fair trial can only be had in that county until after issue joined, when the nature of the defence would appear.** *Rohrs v. Sessions*, H. 1834. 275

**The inserting venue in the body of a declaration, contrary to Reg. Gen. Hil. 4 W. 4, No. 8. is the subject not of demurrer, but of an application to a judge at chambers to strike it out.** *Tanner v. Champneys, Bart.* T. 1834. 859

## VESTED INTEREST, 384

## WAIVING TORT.

*Burn v. Morris.*

485

See the general rule, that he need not have been sworn as a witness, *Summers v. Moseley*, ante, 158. *Rush v. Smyth*, T. 1834.

675

## WOODS.

A manor with the lands and woods over which common was claimed, had been from time immemorial parcel of *Cranbourne Chase*. In 17 *Eliz.* the lord being owner of certain coppices and woods in the manor, granted several leases, for a thousand years, of messuages and lands, with common of pasture as appurtenant thereto, for beasts, over such coppices and woods, in the manner then accustomed by others having like common. The right of common then accustomed was from 12th *May* to 22d *Nov.*, except in those parts of the woods wherein the owner from time to time cut down the wood or underwood at his pleasure, and which he was accustomed to inclose with a fence to preserve the young growth, excluding the deer of the chase for three years, and all commonable cattle for four years, after each cutting. This right was enjoyed by the grantees till the disturbance complained of. The question was, whether the owner of the woods could legally inclose any part of them where the wood had been cut down, so as to keep out all commonable cattle for seven years after each cutting? Held that he could not, on two grounds: first, that stat. 22 *Ed.* 4. c. 7. does not apply to woods wherein rights of common exist; and secondly, that 35 *Hen.* 8. c. 17. s. 8. only extends to woods in which there exists immemorial right of common, in which case it provides a course by which the

space where wood is intended to be cut may be inclosed and kept in severalty for seven years. *Dibben v. Marquess of Anglesea*; *Marquess of Anglesea v. Dibben*; *Same v. Peyton, Dibben and Lill*, E. 1834. 926

Where by an order of reference the costs of the causes referred were to abide the event of them, and in one, which was not at issue, the arbitrator found that the plaintiff had no cause of action against the defendants:—Held, that the costs of the pleadings followed the event of the cause, as in case of a nonsuit. *S. C.*

## WORK AND LABOUR.

See PLEADING, *Chappel v. Hicks*, 43

## WRIT.

Effect of resealing. See LIMITATIONS. Concurrent. See *Lewis v. Morris*.

907

Where it is sought to set aside a declaration and all subsequent proceedings on an affidavit of defendant that he was not personally served with process, and of his brother who lived in the house, that the writ was served on him by mistake on two occasions, the proceedings will stand unless it is sworn for the defendant that the copy served did not reach his hands, or come to his possession, or was not shown him by his brother. *Phillips v. Ensell*, T. 1834. 812

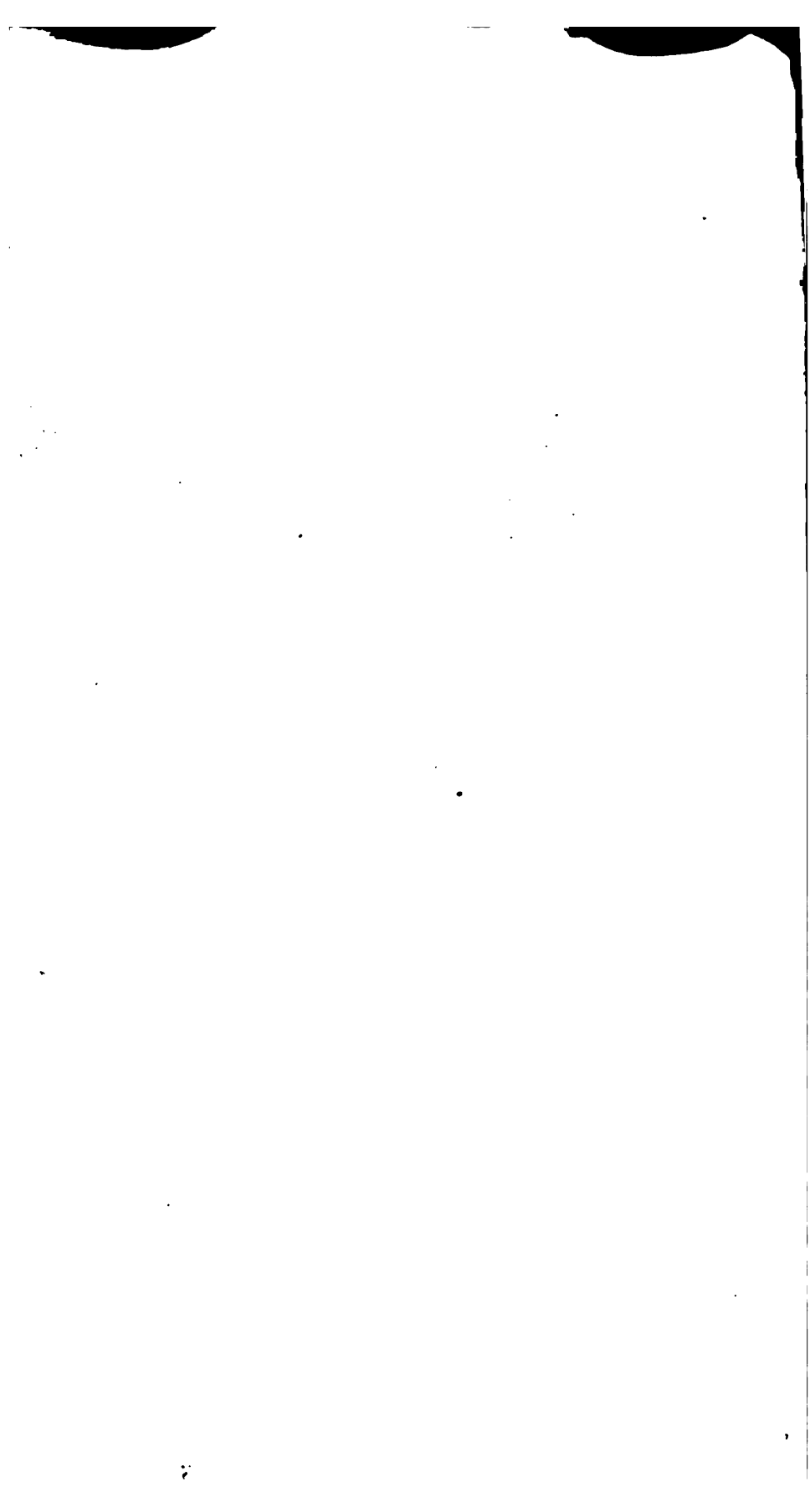
An alias or pluries need not, since 2 *W.* 4. c. 39., be tested of the return day of the first writ, and their issuing is not confined by sec. 10. to any given period after the expiration of the first writ, except it issued to prevent the operation of the statute of limi-

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|-------------------------------------------------------------------------------------------------------------------------------------------|-----|----------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| tations. <i>Nicholson v. Lemon</i> , H. 1834.                                                                                             | 308 | time, and the continuances, if necessary, entered as formerly to connect the alias and pluries with the first writ. <i>Nicholson v. Lemon</i> , H. 1834. | 308 |
| In cases where the writ is not issued to prevent the operation of the statute of limitations, the alias or pluries may be sued out at any |     |                                                                                                                                                          |     |

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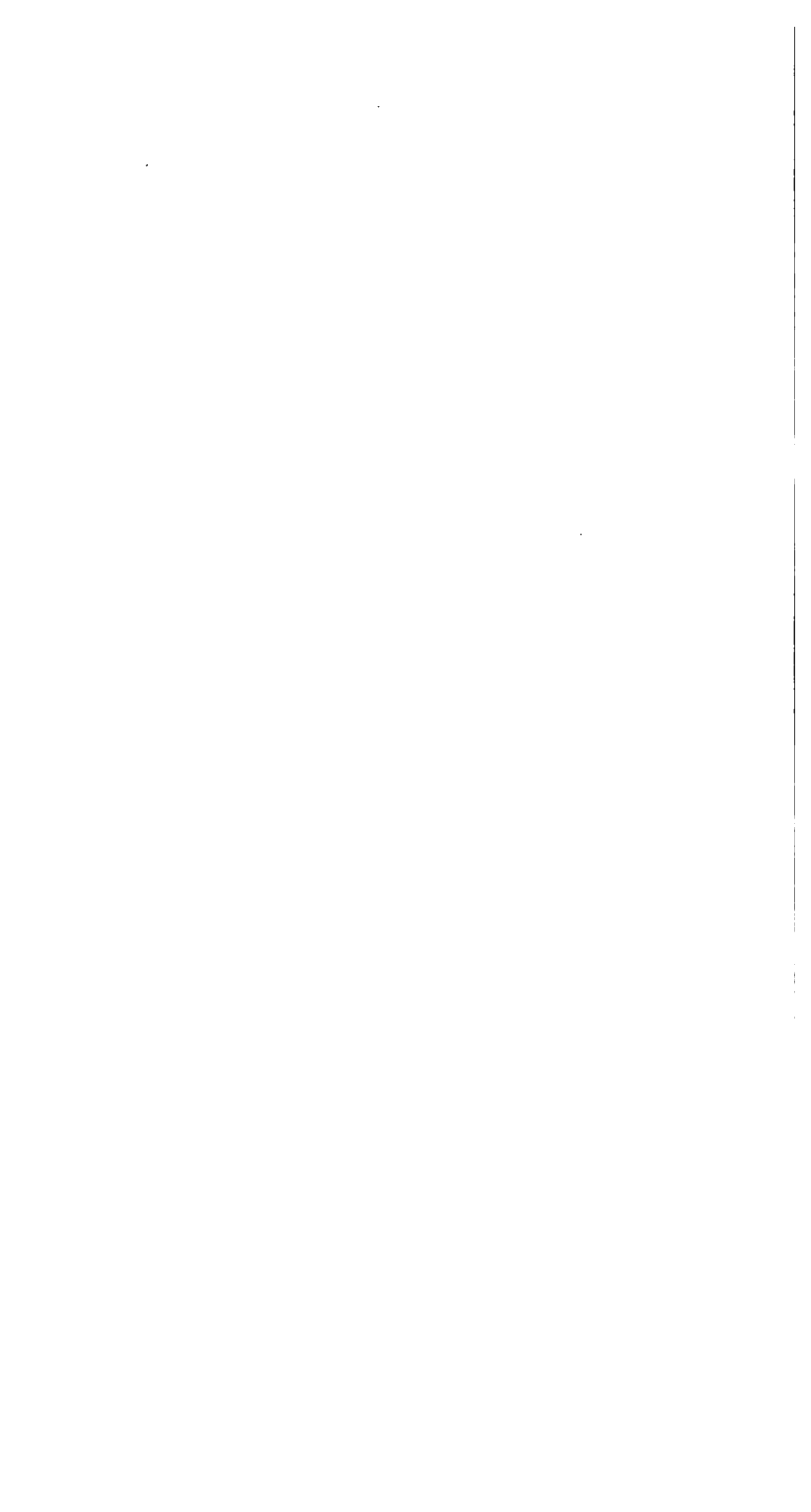
















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